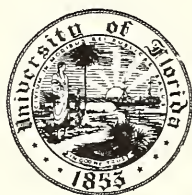



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Language and the Law

THE SEMANTICS OF FORENSIC ENGLISH

by FREDERICK A. PHILBRICK

AUTHOR OF *Understanding English*

THE MACMILLAN COMPANY—NEW YORK

1949

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Preface

THERE are good reasons why those who are interested in language so often come to take a special interest in the language of the courts. Lawyers are students of language by profession. Since the language they use is the principal means by which they achieve their successes, they understand as well as anyone the truth of Coleridge's dictum that an inconceivably large portion of human knowledge and human power is involved in the science and management of words. They exercise their power in court by manipulating the thoughts and opinions of others, whether by making speeches or by questioning witnesses. In these arts the most successful lawyers reveal (to those who can appreciate their performances) a highly developed skill, and to exhibit their methods is the object of this book.

Many lawyers have some acquaintance with the more academic studies of language that, under the name of *semantics*, have been worked out in the last twenty or thirty years and that are still most authoritatively presented in *The Meaning of Meaning*, written by C. K. Ogden and I. A. Richards and first published in 1923. Not everyone realises, however, that the necessity of reaching some clear working understanding about meaning, particularly in actions for libel or slander, led lawyers to conclusions which anticipated by many years some of the work of the modern semantic school. There is indeed no doubt that the practice of law does as much as anything can to give a man an understanding of how words work and of what can be done with them. It is therefore agreeable to find that my *Understanding English*, an introduction to semantics

written without special reference to the law, finds favor with the legal profession. The present book deals with language in a similar way, but is specifically designed for the attention of lawyers and of any others who may be interested in the work of the courts.

There is no lack of material, and with so much to choose from selection has been difficult. The English courts have not been neglected, but no attempt has been made to discuss the language of statutes or contracts—a topic which indeed I am not competent to handle. The book is accordingly a study of *forensic* English, that is, of the English used by advocates and judges in courts of law, and it is illustrative rather than didactic. If there are any earlier books in the English language on this subject, I have not been so fortunate as to find them, and I therefore feel some justification for the hope that my report of these first investigations will be received with indulgence.

As specimens of judicial interpretation, I have quoted largely from the opinions of Justice Holmes of the Supreme Court of the United States. Holmes not only stood alone in his conscious mastery of legal English, but was a generation ahead of his time in recognising the effect on legal thinking of the language in which that thinking is expressed. His ideas about legal abstractions, in particular, foreshadowed some of Korzybski's later work in general semantics and Bridgman's discussion of operational definitions in physics. For quotations from his opinions I have relied mainly on Max Lerner's *The Mind and Faith of Justice Holmes* (Little, Brown, 1943), where a collection of them is to be found together with instructive comment by Mr. Lerner. To the *Harvard Law Review* I am indebted for permission to quote from an article by Holmes printed in that review in 1897. Francis L. Wellman's delightful books *The Art of Cross-Examination*, *Gentlemen of the Jury*, and *Day in Court*, stored as they are with the legal experience of a lifetime, have all been useful, and I have also quoted from L. Herman and M. Goldberg's *You May Cross-Examine*. On the English side the speeches and cross-examinations by the great defence lawyer Sir Edward Marshall Hall have been more fully

preserved, and for good reason, than those of any other modern English advocate, and Edward Marjoribanks' absorbing biographical study, *For the Defence*, has been useful here. I am also indebted to Messrs. Sweet and Maxwell, Ltd., for permission to quote from Gatley's *Libel and Slander*, and to Charles Scribner's Sons for the quotations from C. Darrow's *The Story of My Life* and E. S. Martin's *The Life of Joseph Hodges Choate*. The chapter on the Greenwood trial is based on the report that appeared in *The Times* of London, and is printed with the kind permission of that journal.

F. A. P.

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PRINCIPLES

Persuasion

CHAPTER I

LAWYERS speak to persuade. This is true of all their language in court, whether they are advocates appearing for the litigants or judges whose opinions are intended to convince all who read them that the law has been interpreted correctly. It is the object of this book to examine the language that they use in these endeavors, and by the study of selected passages from the questioning of witnesses, from speeches, and from judicial opinions, followed by the study of a few cases in their entirety, to investigate the principles on which they work.

Though the *end* may be always the same—to carry conviction—the *means* are various. The language of persuasion, like all other language, can be used in three ways, and in this chapter all three will be considered in turn. Language is used to state facts; to express feelings or attitudes; and to induce mood.

Most utterances include all three of these functions, so that in trying to analyse our response to a speaker—what we think and feel about what he says—we have to consider each one. If the speaker displeases us in one respect, perhaps by stating alleged facts that are unwelcome to us, we often attack him for failure in some other respect; objecting, for example, to his attitude towards the witnesses or opposing counsel, or impugning his tone as facetious or oversolemn. Confusion about the different functions of language is not, however, confined to the courtroom. It is the root of many controversies that for centuries have afflicted

(or enlivened) the churches. Should the liturgy be in Latin or in the vernacular? Those who think the service should be conducted in English point to the first function of language, to convey information; those who favor Latin want a ceremonial language that can induce mood. The same issue underlies proposals to modernise the language of prayers and hymns, and disputes about the translation in which the Bible is to be read in church. If the object of the Bible lesson is to give the congregation the clearest possible reproduction of the ideas expressed in the original Greek, then they should hear one of the modern translations, but if the object is to evoke in them the complicated systems of attitudes and feelings represented by the word *worship*, then nothing is so good as the King James Version. Discussions of the merits of Basic English likewise often turn on the purpose that it is to be used for. Those who attack it frequently do so because of its inadequacy in the expression of feelings and the creation of mood, whereas its advocates point to its success in stating facts. Here, as so often in semantic controversies, a statement of the problem, though it may not produce a solution, is at least a strong beginning in the right direction. Confusion of the same kind appears in controversies over simplified spelling. Such spellings as *nite* for *night* are excluded from the published opinions of Justices of the Supreme Court, not because the words so spelt would fail to carry the desired information, but because of the incongruous feelings and mood that they would suggest. With the understanding, therefore, that though the three functions of language may be isolated for purposes of study it is necessary, in the discussion of any utterance, to consider all three, a beginning may be made with the first function, the statement of fact.

"The defendant was born on October 6, 1903." Here is an unadorned statement of fact. Experienced advocates point out that long passages of this kind are out of place in lawyers' speeches in court. Closing arguments, in particular, should never consist mainly of a recital of facts. Because purely factual statements of any length are avoided by the best practitioners, it is necessary

to go outside the courtroom for a good specimen; and it is not difficult to guess that the place to look for one is a passage of descriptive or expository writing by a scientist:

The hardness of metals is measured either by denting the metal with a steel ball dropped from a known height, or by scratching it with a diamond point held in a testing machine. The size of the dent or scratch is then examined under a microscope. The chief use of the hardest metals is to resist wear. Copper printing rollers from which as many as two million copies are to be taken, such as the rollers used for printing postage stamps, are hardened by plating a layer of the very hard metal chromium on them, for without it they would be worn out by a few thousand impressions.

This passage deals entirely with things, not with names, and the writer betrays no feelings about his topic. He does not exclaim at the wonderful skill of the scientists who prepare or study the hardest metals, nor does he show any but the faintest excitement at the thought of the large edition that can be printed from a copper roller plated with chromium. He apparently does not care whether his readers grow interested or excited or not, and he makes no effort to build up a climax for his two million copies or for any other item that could be used to arouse astonishment. Good scientific writing is all of this kind, because a scientist tries to keep his findings clearly separated from his feelings, and to report his work in language free from emotional overtones. Nothing could be less like the task of a trial lawyer.

When a fact has to be impressed on a jury, the most effective method is to go on repeating it over and over, varying the wording, if possible, but relying on reiteration to do its work. Mass-produced goods are all sold by repetitive advertising (this is only one of a number of resemblances between the language of lawyers and that of advertisers). Experienced lecturers to student audiences know that if a fact is to sink in it has to be stated about four times. The greatest advocates have not disdained to use this simple method to the full, and have distinguished themselves from their less accomplished brethren by the variety which they

could give to the performance. In listening to a dexterous speaker we may not notice that he is saying the same thing over and over again, and a clever cross-examiner can continually ask the same witness what is substantially the same question without wearying the attention of the jury or attracting an admonition from the judge. If a witness has to be discredited, and the cross-examining counsel has been so fortunate or so skillful as to involve him in a contradiction, then a whole series of questions can be asked with the object of making it clear to the jury—and making it clear so that they will remember it—that the witness has committed himself to irreconcilable statements. The best plan is to ask him to repeat the answers that are inconsistent, and then to ask him which is correct and whether he wishes to change the answer which he has admitted is incorrect.

To repeat oneself in a speech without appearing to do so is more difficult, and lack of skill may lead to such lamentable passages as that in which ex-Judge Porter, appearing for the plaintiff in the Tilton-Beecher case, described later in this book, said the same thing in almost the same words eight times in a single short paragraph. An example more worthy of imitation is provided by Edward D. Sohier's opening for the defence in the more than well-known trial of Professor Webster for the murder of Dr. George Parkman at the Massachusetts Medical College (where Webster was Professor of Anatomy) in 1849. Webster, who owed Parkman money that he could not pay, invited his creditor to an interview in his laboratory—an interview after which Parkman was never seen again. A few days later a suspicious janitor broke into a vault under the building and there found bones and fragments of flesh. Webster was arrested. The prosecution alleged that he had murdered Parkman, dissected the body, and burned in the furnace the parts that the detectives had not been able to find. Webster's counsel maintained that Parkman had been seen alive after the interview. In 1849 the law did not allow Webster to give evidence in his own behalf, and his counsel argued that he could not be convicted of murder in the absence of any other testimony as to

what happened when the two men met. In the passage from Sohier's speech in which he tries to impress this point on the jury, it will be noted how without much appearance of awkwardness he reiterates the absence of direct proof:

Again, in regard to the interview which took place between Dr. Webster, and Dr. Parkman, it is impossible for us to introduce direct proof concerning it. In the nature of things, no direct proof can be introduced; the circumstances exclude it. The statement of the case, as put to you, is, that the parties met alone, and that the interview was an interview by themselves. Of course, there can be no proof brought, about that interview. The evidence in regard to it,—seeing that we have no direct proof;—seeing that, from the nature of things, we can have no direct proof;—must be circumstantial. And such circumstances as we can introduce, in connection with such of the Government's circumstances, as you give credit to, must constitute the bulk of the testimony in this case, upon which you must render your verdict.

Professor Webster was convicted by the jury and made a detailed confession of his crime: he was hanged.

Utterances expressing feelings or attitudes at their simplest include such statements as, "What a wonderful morning!", "Oh, how my tooth hurts!", or "Take that, you scoundrel!" Lawyers in court have to express attitudes to the facts of the case, to their opponents, to the jury, and to the witnesses.

In presenting his case to the jury, nothing is more important for a lawyer than to display his own personal conviction that he is right. An explicit statement to this effect is forbidden by professional etiquette, and would often be less cogent than the subtler influence of the way in which his questions and speeches are framed, and of his demeanor. Doubt should never be allowed to appear in the opening. "We hope to prove . . ." and similar phrases are a mistake: "We shall prove . . ." and "It will be shown . . ." are better. Daniel Webster is said never to have declared his own opinion in his argument before a jury, and to have owed his successes in court to an appearance of scrupulous hesi-

tation in asserting his own view—an appearance which did not conceal an overpowering certainty that he was right. The late Clarence Darrow, another wonderfully successful performer with a jury, said much the same thing about political audiences in *The Story of My Life*. In this passage he is describing the nomination of Mr. Bryan for President at the Democratic convention of 1896 in Chicago:

Platforms are not the proper forums for spreading doubts. The miscellaneous audience wants to listen to a man who *knows*. How he knows is no concern to them. Such an audience wishes to be told, and specially wants to be told what it already believes. Mr. Bryan told the Democratic convention of 1896 in Chicago what he believed. Not only did he tell them that, but he told them what they believed, and what they wanted to believe, and wished to have come true. I have enjoyed a great many addresses, some of which I have delivered myself, but I never listened to one that affected and moved an audience as did that. Men and women cheered and laughed and cried. They listened with desires and hopes, and finally with absolute confidence and trust. Here was a political Messiah who was to lift the burdens that the oppressed had borne so long. When he had finished his speech, amidst the greatest ovation that I had ever witnessed, there was no longer any doubt as to the name of the nominee. Mr. Bryan was nominated for President.

Overstatement of the facts, which is not at all the same as a confident presentation of them, should always be avoided. Few things are so damaging as an exaggeration by counsel that can be exposed by the other side, and the worst of all is a quantitative exaggeration that can be exposed without possibility of escape. Any kind of angry, abusive, contemptuous, impatient, or intemperate language is also sure to arouse combative emotions in the jury. Here is a passage from Clarence Darrow's book that he would never have allowed himself to utter in the courtroom:

. . . the Volstead Act, which crucifies millions of people for claiming the simple right to drink what they please. This class of Puritan are meddlesome and nosey and contemptible.

This may justly be called an overstatement because the word *crucifies* is an exaggeration of what happened to violators or would-be violators of the Volstead Act; because the right to drink what one pleases is not at all *simple* (what about laudanum?); because the word *meddlesome* is a bias word used as though it carried an argument whereas it carries an emotion; because *nosey* is a term of vulgar abuse that, from the pen of a cultivated man, tells us that he has lost his temper; and because the word *contemptible*, like other terms of abuse, arouses hostile emotions in the minds of hearers and readers. Explicit invitations to the jury to view the other side with contempt are likely to stimulate dangerous feelings of animosity towards the speaker. It may also be noted that here, as so often, loss of temper has led to some rather shaky grammar.

There are a number of qualifying or apologetic words that act as weakeners and that throw doubt on the conviction of the speaker. These should be avoided even when they are ostensibly emphatic or strengthening words. *Very* is one of them. Though it would be unreasonable to ban it from the vocabulary, it frequently diminishes the force of what is said so much that a stark assertion becomes merely an optimistic hope. When a preacher says he is going to preach for a *very* few minutes, his congregation had better settle down for a long sermon. *I am sure that* (as in *I am sure that we all feel*) is a weak beginning because the phrase has so often been used to preface statements that everyone knows to be false ("I am sure that we all hope the better side wins"). *As a matter of fact* has the same unfortunate association with statements that are far indeed from being matters of fact. Other weakeners are *really*, *practically*, and *technically*. *Really* often means *I beg you to understand the words I am using in the sense that I intend for them* ("Though he has had some trouble with the police, the defendant is really an estimable member of society"). *Technically* means *The admission that I am obliged to make is irrelevant to the main issue* ("The defendant may be technically

guilty, but . . ."). *Practically* means *I admit that it isn't actually so, but let us agree to treat as unimportant the differences between my statement and the truth* ("At the time of his arrest, the defendant had practically decided to give himself up"). *Practical* should also be avoided in its use as a bias word indicating vague approval. Opposite the principal hotel in Ipswich, England, there used to be a shop sign which read

JARMAN PRACTICAL WIG-MAKER

It would be difficult to find a theoretical wig-maker.

It is likewise desirable to make only sparing use of such words and expressions as *obvious*, *clear*, *it is plain that*, *it does not need research to show*. If something is obvious, then there is usually no need to point to it; if it is not obvious, then the audience soon finds out for itself that it needs more explanation than the speaker is willing or able to give. Speakers can also give themselves the lie in other ways, of which an amusing example is to be found in Saki's novel *The Unbearable Bassington*:

Stephen Thorle recounted a slum experience in which two entire families did all their feeding out of one damaged soup-plate.

"The gratitude of those poor creatures, when I presented them with a set of table crockery apiece, the tears in their eyes and in their voices when they thanked me, would be impossible to describe."

"Thank you all the same for describing it," said Comus.

Understatement, on the other hand, may be an effective method of presenting the facts so long as it does not verge on uncertainty, with which it should have nothing to do. To say that something is *in doubtful taste* is as damning as to say that it is *in bad taste*. It is often advisable to describe *discreditable* motives as *ambiguous* or *equivocal*—epithets which for an advocate have the useful property of being difficult to refute. Moreover, if the jury find that the testimony reveals more rather than less than was claimed in the

opening, they are likely to give credit to counsel for the difference and a good deal more.

This honest creature doubtless
Sees and knows more, much more, than he unfolds,

Othello says of Iago, whose suggestions to him, though utterly mendacious, are a model of effective understatement that any lawyer might imitate.

Every advocate has to decide, in the course of even a short case, what is to be his attitude towards his opponents, and much that is significant in this direction can be learned from the practice of the successful. It will be well to start with one of the most persuasive orators of whom there is any record—Mark Antony in Shakespeare's *Julius Caesar*. The late Arthur Train, whose stories of his profession have been read by millions, once said that a young lawyer could not better prepare himself for the speaking required of him than by committing to memory some of the great speeches from Shakespeare. Among all the scenes in Shakespeare this one (*Julius Caesar*, Act III, scene 2) has the most useful lessons for legal practice. At this point in the play Caesar has just been murdered by a band of conspirators, led by Brutus, because they believed him to be seeking the whole power of the state. Brutus supposes Mark Antony to be in sympathy with the conspirators, and when Caesar's body is brought in he asks the crowd to listen to a speech that Mark Antony will make to them:

I do entreat you, not a man depart,
Save I alone, till Antony have spoke.

The crowd has been brought to approve of the murder, on the ground that Caesar was a tyrant, but Brutus is mistaken in supposing that Antony approves of it. On the contrary, Antony intends to turn the crowd against Brutus. He cannot attempt to do so openly or at once, because the temper of his audience is against him, but he attains his object by the famous speech in which he

pretends to praise Brutus and to condemn Caesar while actually doing the opposite.

The first thing to be observed in this speech (Act III, scene 2, line 79) is that Antony repeatedly identifies himself with his audience, and reminds them that they all know him. He calls them *gentle friends, good friends, sweet friends, Romans, and countrymen*. The same approach can be observed in many an American advocate who has to address a jury. Though plainly an orator of the most artful and accomplished kind, Antony explicitly disclaims any powers of persuasion:

I come not, friends, to steal away your hearts.
I am no orator, as Brutus is,
But (as you know me all) a plain blunt man
That love my friend; . . .

For I have neither wit, nor words, nor worth,
Action, nor utterance, nor the power of speech
To stir men's blood. I only speak right on.*

Every assertion in these lines must have been manifestly false to the whole audience, since they were at that moment witnessing a stupendous display of all the powers so strenuously repudiated by the speaker. Indeed, self-depreciation on the part of writers and speakers is rarely either sincere or disinterested. But Antony has brought his hearers to a point at which they are feeling, not thinking, and the question "true or false?" is not one that it occurs to them to ask. So that in a speech intended to rouse the mob against Brutus and Cassius, he says

I will not do them wrong,

and while rebutting the arguments of Brutus he alleges

I speak not to disprove what Brutus spoke.

* An observation that might truthfully be made by many orators.

So completely has he persuaded his hearers to abandon the use of reason that in producing Caesar's will he is able to say

'Tis good you know not that you are his heirs;
For if you should, O, what would come of it?

In this sentence he provides the information while giving himself credit for withholding it.

Mark Antony avoids logic or the discussion of facts. The questions at issue are: was Caesar ambitious, and did he intend to grasp absolute power? In proving the negative, Mark Antony has one valid argument, and this he brings out at an early stage, while his hearers are still in a condition to understand it:

You all did see that on the Lupercal
I thrice presented him a kingly crown,
Which he did thrice refuse. Was this ambition?

It is true that he adduces other arguments, though none of them has much bearing on the matter in dispute. Thus he suggests that Caesar cannot have been ambitious because

He was my friend, faithful and just to me,
and because

He hath brought many captives home to Rome,
Whose ransoms did the general coffers fill,

and because

When that the poor have cried, Caesar hath wept;
Ambition should be made of sterner stuff.

He likewise attributes a lack of plausible arguments to his adversaries. The line

Yet Brutus says he was ambitious

suggests that Brutus makes a mere assertion with nothing to support it.

I am no orator, as Brutus is

is a warning that his adversary can make what is false seem true.

They that have done this deed are honourable.
What private griefs they have, alas, I know not,
That made them do it. They are wise and honourable,
And will no doubt with reasons answer you.

Here Mark Antony insinuates first, that though the conspirators may claim to have reasons for their act, the reasons are so obscure that he is unable to understand them; and second, that their true motive was personal spite (*private* griefs), and not public spirit as alleged. The oft-repeated epithet *honourable* applied to the conspirators, and in particular to Brutus in the line

For Brutus is an honourable man

is intended both as irony, with the implication that Brutus is not honorable at all, and as a suggestion that though Brutus may be honorable it is the only good thing that can be said of him. If a man is praised at great length by repeated application of the same adjective, and that only, it is natural to suppose that he has no other good qualities that can be held up for admiration. There is also a hint that though Brutus may be honorable, the other conspirators are not. To drive this home the speaker of the lines

For Brutus is an honourable man;
So are they all, all honourable men

puts the stress in the first line on the word *Brutus*, and then, pretending to catch sight of the implication that the others are not honorable men, hurriedly adds the second line to exculpate them.

For the most part, however, Mark Antony avoids the dangerous ground of logic and works directly on the emotions. Like a modern writer of advertising copy, he chooses those that are the most easily aroused. With the corpse of a freshly murdered man as an exhibit, he has no difficulty in exciting the mob to a passion. He works on their pity:

But yesterday the word of Caesar might
Have stood against the world. Now lies he there,
And none so poor to do him reverence.

Brandishing Caesar's mantle, with the rents made in it by the daggers of the assassins, he rouses the people to a fury, which he brings to the fiercest point by exposing the body itself. When finally he awakes their cupidity by revealing the terms of Caesar's will, they rush from the scene intent on destroying the assassins.

The methods of Mark Antony were ancient even in his own day. Justice Cardozo writes in *Law and Literature*: "If you will turn to Dobson on *The Greek Orators*, you will find that a litigant hard beset would dwell with humility upon his own meager powers of eloquence or persuasion, and beseech the jurors to be on their guard against the eloquence and persuasion of his more experienced and gifted adversary. Why, you can go into the City Court of New York any day of the term, unless things have greatly changed since I used to practice law, and hear the same argument from men who would stare at you in wonderment if you were to tell them it was Attic Greek."

Here is an illustration of Justice Cardozo's remarks. It comes from a speech made by Joseph H. Choate in addressing the jury on behalf of the plaintiff in *Stewart v. Huntington*, and quoted in E. S. Martin's *Life*:

I doubt whether any man ever had to contend alone against so powerful a combination. In the first place, there is the defendant himself, one of the three great railway monarchs of the world, all powerful throughout the length and breadth of the land, and he

has called here to aid him, as was his right, the greatest powers of the bar, the most astute, the most crafty—in the best sense of the word—the most skilful of our profession, and (here Mr. Choate made a graceful wave of the hand towards Mr. Conkling), the very Demosthenes of our time. And yet I do not feel entirely alone or entirely unarmed. I have the evidence in this case with me, and if I can put that little weapon in my sling and aim straight at his forehead, the recent Goliath of the continent is bound to bite the dust.

To be noted here are the compliments to the lawyers on the other side, intended to put the jury on their guard against them, and the well-chosen simile in which Huntington is compared to Goliath—well chosen because it suggests that the magnate is tyrannical and vulnerable. By calling his opponent the *recent* Goliath, Choate implies that his power has already declined.

Joseph Choate, able though he was, sometimes went too far in the eulogies which he heaped on opposing counsel. Here is an example from *Martinez v. Del Valle*, in which he appeared for the defendant, a rich Cuban who was sued for breach of promise of marriage by a young lady whom he had befriended in New York. It is taken from Francis L. Wellman's fascinating and instructive book *The Art of Cross-Examination*.

Very early in the trial Mr. Choate warned the jury against the seductive eloquence and power of the learned counsel whom the plaintiff had enlisted in her behalf,—“one of the veterans of our Bar, of whose talents and achievements the whole profession is proud. In that branch of jurisprudence which I may call *sexual* litigation he is without a peer or rival, from his long experience! You can no more help being swayed by his eloquence than could the rocks and trees help following the lyre of Orpheus!”

The chief counsel for Miss Martinez was William A. Beach, who appears elsewhere in this book as chief counsel for the plaintiff in *Tilton v. Beecher*. On this occasion he made an explicit reply to Choate's remarks. Without the opportunity of hearing the tone in which the passage was delivered, it is difficult to know how well

he was justified in taking offence. Choate's use of the word *sexual* (a powerful word that needs to be cautiously used in any personal dealings) in proximity to the words *long experience* and in combination with what we may guess to have been the bantering tone of the passage, would seem to convey at least the hint of an insult. So at least thought William Beach, and he replied as follows. His last sentence hits off neatly enough the topic of the present discussion.

During the progress of this trial, counsel has seen fit to make some personal allusions to myself. It seemed to me not conceived in an entirely courteous spirit. He belabored me with compliments so extravagant and fulsome that they assumed the character of irony and satire. It is a common trick of the forum to excite expectations which the speaker knows will not be gratified, and blunt even the force of plain and simple arguments which may be addressed to the jury.

To end this brief study of a lawyer's attitude towards his opponents, here is an amusing example from the life and works of Francis L. Wellman. In 1892 Mr. Wellman was Assistant District Attorney in New York, and led the prosecution of Carlyle Harris, the poisoner whose trial is described later in this book. The defence was conducted by John A. Taylor, William Travers Jerome, and Charles E. Davison. In opening his case to the jury, Mr. Wellman said:

I have the satisfaction of knowing that the prisoner will be defended by a gentleman who has had wide and extended experience in criminal cases, and that he has associated with him a man who is a scholar, an able lawyer and a gentleman, an honor to the profession he adorns. We can rest assured, therefore, that everything that can be done for this defendant will be done before you.

And in his closing speech he said:

He has been defended with great sagacity, with the utmost skill and industry; I have nothing but words of praise for the

genius, zeal and ingenuity shown in his behalf by his counsel, and whatever the result of this trial, they certainly can feel that they have done all in man's power to release this prisoner and persuade you of his innocence.

In *Gentlemen of the Jury*, however, a book of reminiscences which he published in 1924, many years after Carlyle Harris had gone to the electric chair, Mr. Wellman described the "able lawyer" in different, and presumably more candid, terms:

Mr. Taylor was at that time a lawyer of some prominence, and was president of a leading literary society, but he had no conception whatever of the proper conduct of a criminal case. It would have been far better for Harris had his fate lain entirely in the hands of Mr. Jerome, who, at that time, had only recently been an Assistant District Attorney and knew every nook and corner of a murder trial, to which Mr. Taylor was being introduced for the first time in his professional experience.

In attempting to describe what should be a lawyer's attitude towards the jury, it would be difficult to improve on the account of Rufus Choate quoted by Francis Wellman (who calls him "probably the greatest jury lawyer America ever produced") from Parker's *Reminiscences of Rufus Choate*.

Mr. Choate's appeal to the jury began long before his final argument; it began when he first took his seat before them and looked into their eyes. He generally contrived to get his seat as near them as was convenient, if possible having his table close to the Bar, in front of their seats, and separated from them only by a narrow space for passage. There he sat, calm, contemplative; in the midst of occasional noise and confusion solemnly unruffled; always making some little headway either with the jury, the court, or the witness; never doing a single thing which could by possibility lose him favor, ever doing some little thing to win it; smiling benignantly upon the counsel when a good thing was said; smiling sympathizingly upon the jury when any jurymen laughed or made an inquiry; wooing them all the time with his magnetic glances as a lover might woo his mistress; seeming to preside over the

whole scene with an air of easy superiority; exercising from the very first moment an indefinable sway and influence upon the minds of all before and around him. His manner to the jury was that of a *friend*, a friend solicitous to help them through their tedious investigation; never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment.

Most experienced lawyers who have written on this subject agree that flattery sufficiently obvious to be detected by the jury is more likely to alienate their sympathy than to gain it. It is useful for the speaker to identify himself with his hearers, just as Mark Antony did, though in appeals to the group feelings, which include those of class, nationality, race, and religion, the too obvious claims may be offensive even to unsophisticated people. Thus in addressing a jury of farmers it is not necessary for a lawyer to pretend to be a farmer himself. He should, however, adapt his speeches to his audience by using language that a farmer may be expected to understand, by appearing to regard farming as the normal way of spending one's life, and by drawing his figurative language from the soil. Juries are easily antagonised by lawyers who underestimate their knowledge or intelligence, and it is better to leave some allusions imperfectly understood than to speak of "Paris, France" or of "Abraham Lincoln, the great president."

It must be confessed, however, that the crudest appeals are on occasion successful. Vivid examples of the exploitation of various prejudices held by the jury (and race-prejudice in particular) can be found in the lynching case tried at Greenville, South Carolina, in May 1947. On the night of February 15 of the same year, a white Greenville taxi-driver named Brown was found beside his taxi fatally injured with knife-wounds. Other attacks on white drivers by Negro passengers had taken place in the district, and this fresh crime created great excitement. Suspicion fell on Willie Earle, a young Negro who had been Brown's fare earlier in the day. He was arrested and put in jail. On the next night, however, a number of persons appeared at the jail and forced the keeper to

surrender him to their custody. It is alleged that a number of taxicabs then drove to the outskirts of the city with Willie Earle in one of them, and that he was there mutilated with a knife before being beaten to death with the butt of a shotgun, crying, "Lord, you done kill me." Be that as it may, his body was found by the roadside the next morning. His supposed assailants were interrogated and afterwards charged with murder.

The chief evidence for the prosecution consisted of statements made by the accused, for there was great difficulty in persuading local witnesses to testify. The jailer, for example, himself a Negro, professed that he was unable to identify any of the persons who had taken Willie Earle from prison. The defendants were represented by a total of seven lawyers, but they called no witnesses. The closing arguments of these lawyers, which occupied several hours, are instructive examples for study. They must have been effective, for all the defendants were acquitted by the jury.

In these speeches Willie Earle was commonly referred to as *a dead nigger* or *a dead nigger boy*, and there was a strong suggestion that the law was unreasonable in taking note of the death of so insignificant a creature. When the prosecution tried to introduce in evidence some photographs of the body showing that it had been mutilated before death, Mr. Wofford, a defence attorney, said, "they don't prove a thing except the nigger is dead, and everybody knows that." The true reason for the prosecution, the defence suggested, was the well-known desire of the North to interfere with and humiliate the South. In advancing this argument, some of the lawyers loaded their delivery with a heavy Southern accent. The jury was asked by Mr. Wofford "to recall that the North never sympathises with us, always criticises us ever since they laid waste to our land, burned every piece of Southern property." Great resentment was expressed at the presence in court of the representatives of *Life*, *Time*, and other national magazines, described as "Northern publications," and at references to the case by radio commentators. The accused, said one of the defence law-

yers, were "victims of the incurable malady of meddler's itch." "Southerners," said another, "are peculiar people who get along pretty well without Northern meddling." The F.B.I. agents who had been sent to Greenville to prepare the case for the prosecution were the objects of attack on the grounds that they were foreign intruders supported at government expense. When they remained in Greenville to hear the defence, as it was plainly their duty to do, Mr. Wofford referred to them in the following terms: "They finished their testimony on Saturday. They're still here in the best hotels in our city, with per diem expenses and fine salaries. They'll be here to-morrow. You and I as taxpayers are paying for them to be here when they ought to be out working like the rest of us."

Also worthy of quotation is Mr. Bolt, another defence lawyer, in his references to one U. G. Fowler, a taxi-driver who testified that he had been asked to join the alleged lynching-party and had refused. He was later beaten and threatened with death. When asked what his initials stood for, he replied that he did not know. (They may have stood for Huger, a well-known Southern surname that is so pronounced.) Mr. Bolt, however, tried to play on the jury's hatred of the North by pretending that the witness's given names were Ulysses Grant. U. G., he said, didn't sound right with him. "It doesn't spell Robert E. Lee or Stonewall Jackson."

The statement of facts and the expression of attitudes are not the only means by which the lawyer in court is able to influence his hearers. He can induce mood. By this is meant the production in his audience not so much of specific opinions (the prisoner is guilty; this witness is lying) as of feelings and thoughts of a certain kind. He can produce an atmosphere of pity, sympathy, and loving-kindness; or of duty, inflexibility, and sternness. He can produce in the minds of the jury such thoughts as these (though neither he nor they will make them explicit):

The world is a complicated and difficult place, and we must be careful not to come to wrong decisions.

Human society is a delicate organism that can be preserved only by strict retributive justice.

The individual is the most important thing in the world, and society is a restrictive system from which he needs protection.

All human problems can be solved by the exercise of charity and love.

This kind of work requires subtlety. Much is expressed by the demeanor, gestures, and tone of voice of the speaker. His use of metaphor requires a chapter to itself, and here it will be enough to discuss the effect on mood of the words that he uses.

Every writer knows that a different diction is required for the sports page of a newspaper, a letter of condolence, and a presidential inaugural address. Speeches in court vary between the slangy and the scholarly, and between the colloquial and the stately. An important distinction between two kinds of language that may be roughly called the *factual* and *emotive* is the subject of Chapter III. Meanwhile it will be useful to point briefly to some faults that may hinder the establishment of the mood desired by the speaker.

First on the list of undesirables comes the cliché—the trite phrase that the newspapers have made familiar to everyone. *Last but not least; bed of roses; leaves nothing to be desired; she leaped to her death.* Though only the most careful speakers can avoid all such things, all good speakers make efforts to do so. The cliché is offensive to an educated audience because freshness and novelty are qualities that may reasonably be expected from even unskillful speakers; because the worst specimens have a repugnant pretentiousness about them, as though the user felt that this time at least he had hit on the right phrase; and because the speaker addicted to clichés shows himself to have an affinity, conscious or not, with the lowest intellectual levels of the literate population. Words and phrases, like people, are known by the company they keep,

and only an imperceptive person would wish to identify himself with the cheapest journalism of our time. Nor is such language effective even at these levels: the words may soothe the ignorant by their familiarity, but are unlikely to persuade. They are mentioned here because such things are fatal to the creation of mood. A lawyer's argument is equally valid whether he expresses it in terse and vivid English or in hackneyed phrases that might have been taken from the balloon-enclosed conversations of the comic strip. But the mood that might win him a verdict is fatally injured by such mistakes, and just as a vulgarism can destroy the mood produced by a sermon, so can a lawyer's eloquence be made ineffective if his diction shows too clearly that he spent a neglected youth.

Also to be avoided are the redundant, falsely emphatic, or merely ungrammatical expressions that the voice of the radio, more like that of a retarded high-school boy than of an educated adult, has made nauseatingly common. Among them are *at this same time* (for *at this time* or *at the same time*); *equally as good* (for *equally good*); *in the event that* (for *if*); *prior to* and *previous to* (as adverbial phrases meaning *before*); *following* and *subsequent to* (as adverbial phrases meaning *after*); and *due to* (for *because of*). Less objectionable, but to be avoided, are *if and when* and such needlessly expanded phrases as *both of the men*, *each of the men*, and *all of the men* for *both men*, *each man*, and *all the men*.

Another oratorical vice likely to offend the educated is the continual use of the word *just* in the phrases *just how*, *just when*, *just why*, *just who*, *just which*, *just what*, and *just where*. These combinations are to be avoided partly because they are habit-forming, and partly because they claim a precision which the speaker's thought seldom justifies. If someone asks *just when* something happened, it should mean that he desires to fix with precision the time of the event, but too often it shows only that the speaker has the habit of adding *just*, regardless of the setting, whenever it is possible to do so.

Prudent speakers will do well to make themselves familiar with the correct meanings of various words and sayings that educated people are accustomed to use as signs or tests of the education or intellectual powers of those they listen to, just as at the grammatical level one can form some notion of a man's intellectual background by finding out whether he uses *like* as a conjunction (*I wish I could speak good, like you do*) and whether he says *different from* or *different than*. Such words are *allergic*, *unthinkable*, and *shambles* (which means a scene of slaughter, not a merely untidy place). Among the sayings are *the exception proves the rule* (in which *proves* means *tests*); *a custom more honored in the breach than the observance* (which means that it is more honorable to neglect the custom than to follow it, not that the custom is more often neglected than followed); and *it's all very well in theory, but won't work in practice* (a saying which sets an intelligent mind to wondering what is wrong with the theory, since correct theory is, by definition, a description of what does work in practice).

The use of quotations is a favorite method of inducing mood. It may be fantastically overdone, as by William A. Beach in his ten-day closing speech for Theodore Tilton in *Tilton v. Beecher*, but it may be effective. If the quotation is well known, and closely fits the situation before the court, it is valuable not only for the feelings that it induces about the case but also because the jury, who may be less well-read than the speaker, are led to admire his skill in finding such a thing. Words that were written by someone else seem to have more weight than those the speaker has composed for himself: it is as though he spoke with the authority of the great writer whose words he borrows. Celebrated examples are Beach's application of Whittier's *Ichabod* to Henry Beecher, and Brougham's denunciation of George IV in a quotation from *Paradise Lost*: both are described later. But Shakespeare's tragedies furnish most of the material, and among them *Othello* easily leads the field. It is full of references to the unfortunate effects of jeal-

ousy and sexual passion (how often does one hear of *the green-eyed monster!*), set out in Shakespeare's most magnificent verse, and a jury must be insensitive indeed if they are unmoved by the appropriate use of some of the passages from this play. Because of its theme, it has always been a favorite with lawyers defending their clients on murder charges, and they do not fail to hint to the jury that they had better be careful to avoid the example of Othello, who put a supposed offender to death on suspicions that afterwards proved to be false. William Howe, the senior partner of the celebrated New York law firm of Howe and Hummel, was very fond of quoting from this play when he appeared before a jury, and so was Sir Edward Marshall Hall, the most successful defence lawyer of his time in criminal cases in England. His dramatic use of it in the Greenwood trial is described later.

In this first chapter some of the methods have been indicated that are available to a speaker who wishes to carry conviction to a judge or a jury. In the attempt to describe these methods more closely we shall find ourselves much assisted by the studies of meaning (called *semantics*) that have been made in the last thirty years or so, and which now make it possible to formulate distinctly some principles that had previously been but dimly understood. These studies will be the subject of the next chapter.

Interpretation

CHAPTER II

WORDS, whether written or spoken, are symbols. They stand for or represent something in such a way that when we notice the word, whether by seeing it or hearing it, the thought of that something comes into our minds. Words, that is, are symbols for thoughts. There are many other possible symbols for thoughts. A bunch of flowers sent to a friend on her birthday is such a symbol; so is the bow that we make to her when we meet her; and so are the gestures that many people make when they speak. This is not mere linguistic theory. It has for long been recognised in the courts, and a libel action can be as well grounded on symbolical behavior as on words. The courts have held that it is libellous to burn a man in effigy, and a gallows placed over a man's door is likewise a libel on him. An English litigant once brought an action because a wax figure of him had been placed on the threshold of the Chamber of Horrors in Madame Tussaud's well-known exhibition in Baker Street, London, and it was held that an action lay. Even a dash representing a name, or a row of asterisks, can be libellous, and if the identity of the plaintiff can be plausibly guessed by a reader, it is no defence to say that his name was not mentioned in the libel.

Like other symbols, words do not maintain a strict one-to-one relation with the things symbolised. They seem to grow roots in the mind, and there they get tangled with other growing things, so that all the words standing for thoughts that are important to

the thinker have associations for him. These associations are called the *connotation* of the word, and are different for every person, though the various connotations that the same word has for different people are likely to have much in common. The so-called "actual" or "dictionary" meaning of a word is sometimes described as its *denotation*, though many writers avoid this term because it suggests that a word has a fixed and ascertainable meaning common to all persons who use or encounter it—an idea which as applied to many words (i.e., the abstract words) is dangerously false.

Words not only have associations that a user could enumerate if he had the necessary memory and application, but also form secret or hidden connections in the unconscious levels of the mind. A man may find, for instance, that the apparently inexplicable dislike which he feels for a person or a place originates in a name with unpleasant associations for him. Most such connections, however, are less obvious, and can be restored to consciousness only with the help of psychoanalysis. For this reason, it is seldom possible for a lawyer to know what word-associations are likely to be favorable or unfavorable for members of a jury, though he should certainly try to exclude any prospective jurymen whose name is the same as that of any of the parties, or even the counsel, on the other side.

The study of the connection between a word and what it stands for is called the theory of definition. It is the beginning of any study of the working of language, and is of practical importance in some branches of the law; for instance, the law of libel and slander. Fortunately an elementary study offers no difficulty.

First we had better dispose of some superstitions. A primitive notion survives in many parts of the world—it is perhaps hardly rational enough to be called a belief—that the connection between a word and the thing it stands for is closer than the merely mental connection between symbol and object. Most primitive peoples imagine that the word not only stands for but in some sense *is* the thing. Such a notion leads them to incantations and other manifestations

of word-magic, and is responsible for the ancient horror of blasphemy. The true names of the old gods, including Yahweh, the god of the Hebrews, were often secret, and since to mention one of these names aloud was to bring down the god himself (the name being identified with the deity), the utterance was regarded as an act endangering the public safety. The blasphemy laws enforced in recent times protected the names of religious veneration only from public disrespect, and could no doubt be justified as tending to prevent breaches of the peace, but in this they were typical of primitive customs that survive in modern times in disguise. Such Christian anniversaries as Easter, Christmas, and All Souls' Eve are the modern representatives of primitive festivals celebrated at corresponding seasons, and the pre-Christian archetypes of the Holy Communion are well known to students of the history of religion. When a witness in our courts lifts his right hand as he takes the oath, he no longer expects his god to strike him dead if he tells lies, but there are many plausible reasons for continuing the custom after the belief that it was based on has passed away.

The rational connections between words and thoughts are not difficult to follow. Words may stand for thoughts of three kinds. First come thoughts of picturable things that can be seen and touched. Words referring to these things are defined by pointing. If there is any doubt as to the meaning of the word *coal*, some specimens of coal are procured and doubt is at an end. Second come thoughts of actions. Words referring to these actions are defined by pantomime: the verb *to kick*, for example, is defined by performing the action. These pantomime definitions are called *operational definitions* by physical scientists. All physical units, such as the *yard* or the *centigrade degree* or the *ampere*, are defined in this way, and many of the definitions are embodied in statute law.

Words that can be defined by pointing or by pantomime may be called *concrete* words. Words of the third type, called *abstract* words, stand for thoughts of relations, whether these relations are between picturable things or between actions or between thoughts.

An abstract word has to be defined by a metaphor—by an *as though* or *as if* process—and for this reason abstract words have no fixed or “correct” or “accepted” meanings, nor can their definitions be incorporated into statutes. Controversies about the “correct” definitions of words are usually about abstract words. *Democracy* and *beauty* are examples, and of special interest to lawyers are *freedom*, *justice*, *law*, and *rights*. The meanings of some of these will be discussed in what follows.

Many years before writers on language had clearly formulated their opinions about meaning (of which an outline is attempted in this chapter), necessity had driven advocates and judges to similar conclusions—especially those lawyers concerned with actions for libel and slander. In such actions two important semantic principles have been thoroughly established in American and English courts: the first, that meaning is in the mind of the hearer or reader; the second, that meaning depends on context.

In actions for libel or slander, it has long been laid down that the meaning of the words is not the thought in the mind of the utterer. “The question is not what the writer of an alleged libel means, but what is the meaning of the words he has used.” (Lord Bramwell in *Henty’s Case*). And Gatley, in his *Libel and Slander*, from which this quotation is taken, continues, “the meaning of the writer is quite immaterial. The question is, not what the writer meant, but what he conveyed to those who heard or read.” A slander spoken in a foreign language is not actionable if no one present understands the language. And again, it is no defence to say that words were spoken in jest unless they were also understood in jest. “The whole question is,” says Gatley, “whether the jocularity was in the mind of the defendant alone, or was shared by the bystanders.” Ironical praise is actionable, if the irony is understood by the hearers, and there was a successful action against a defendant who said the plaintiff had done something “God only knows whether honestly or otherwise.”

It seems to have been I. A. Richards who first explicitly declared that the meaning of a word is the missing part of its context. Be-

cause this is so, we are able to understand without referring to a dictionary words that we meet for the first time, thus adding to our vocabularies by the process that children use. When a boy reads in an advertisement that something is the *acme* of perfection, it is easy for him to guess that *acme* means summit, since that meaning is the only one that makes sense of the context. The meaning that a hearer attributes to a familiar abstract word heard in a speech is therefore made up of two elements: the meaning that he already has for it in his mind, made up of the missing parts of the previous contexts in which he has heard or read it; and the meaning that he thinks is required by the word in its present context. Here *context* includes not only the other words in the speech, but everything else that has any bearing on the speaker's intention: his gestures, tone, and actions, and the circumstances in which he finds himself. To give a simple example of what may be highly complicated, the word *hell* has different meanings when pronounced in a sermon in church and when used as an expletive on the golf links.

All this has been known for many years to lawyers engaged in libel suits. This is what Gatley says (*op. cit.*):

"If the words in their natural and ordinary sense are innocent or meaningless, still a further question may arise: Were there any facts known to those to whom the words were published which would lead them to understand them in a secondary and defamatory sense? Words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the circumstances in which they were uttered or written, and with reference to the context in which they appear.

"The manner of publication, and the things relative to which the words were published and which the person knew or ought to have known would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances and to such persons knowing those circumstances as to convey a meaning very different from

that which would be understood from the same words used under different circumstances."

"The words must be construed as a whole. It is necessary to take into consideration, not only the actual words used, but the context of the words. It would be unfair to the defendant to pick out this or that sentence which may be considered defamatory, for there may be other passages which take away their sting. If in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together. The defendant is entitled to have read as part of the plaintiff's case the whole of the publication from which the alleged libel is extracted, and also any other document referred to which qualifies or explains its meaning."

"Where nothing is alleged to give them an extended meaning, the words must be construed in their natural and ordinary meaning, i.e., in the meaning in which reasonable men of ordinary intelligence would be likely to understand them." It should be noted that Gatley does not say that the meaning of a word is its dictionary meaning; on the contrary, he says that meaning resides in the mind of the hearer. This is illustrated in the following case quoted from his book:

"The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. would pay them. He subsequently wrote and mailed to the plaintiff a postcard containing these words: 'I saw J. S. this morning: he said, "Make the S. B. pay it."' The plaintiff brought an action for libel, alleging in his innuendo that the letters S. B. meant 'Son of a bitch.' It was held by the Court of Appeal in Ontario, affirming Britton, J., that the postcard was harmless in its primary meaning, and that the letters S. B. not having acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression, and the plaintiff having given no evidence that they conveyed the defamatory meaning alleged in the innuendo, the defendant was entitled to judgment."

Two examples may be given of words that have been defined

by statute. In England the Anglo-Portuguese Commercial Treaty Act of 1914 states that

The description "Port" or "Madeira" applied to any wine or other liquor other than wine the produce of Portugal and the island of Madeira respectively shall be deemed to be a false trade description within the meaning of the Merchandise Marks Act, 1887, and that Act shall have effect accordingly.

In 1923 a company which had been selling a liquor labelled "Tarragona port" claimed that "Tarragona" was a well-known article of commerce before the Treaties, and that "Tarragona port" was not a false description provided the liquor contained a reasonable proportion of Tarragona. The English courts found against them. A more significant example is afforded by the word *Negro*. In some Southern states, statutory definitions lay down that a Negro is anyone with one quarter (in some states one eighth) African blood. A. G. Hays, in his book *City Lawyer*, tells of a couple from the Bahamas who after building a house in Scarsdale, New York, found that the property was included in a covenant prohibiting tenancy by Negroes. There is no statutory definition of a Negro in New York, and Mr. Hays was able to obtain an affidavit from Professor Franz Boas, the celebrated head of the Anthropology Department at Columbia University, that a Negro is "a human being with one hundred per cent African blood."

The words whose definitions have been fixed by statute are naturally few. Unreflecting persons are often inclined to suppose that the definition of any word is fixed by the dictionary, but this, as has already been hinted, is an illusion. There is death in the dictionary, said Lowell. Definitions are fixed by usage, and meanings by usage and context. Dictionaries follow usage; they do not decide or lead it. If there were no dictionaries (and many of the cultivated people whose preferences determine usage never consult one), meanings would be unchanged. But though dictionaries do not settle meanings, they act as anchors or stabilisers in restricting changes in meaning.

It is important in many fields of study, and not least in the law, to get a firm grasp of the fact that abstract words have no fixed or "correct" meanings. The theory, for example, that there is such a thing as *justice* that exists independently of human minds, and that the business of the law is to find out what it is, will not stand examination. The theory is a modern representative of Plato's philosophical concept of universals, and survives partly as a naïve idea that if there is a name for a thing the thing must exist, and partly (as is persuasively argued in Jerome Frank's *Law and the Modern Mind*) as a relic in adults of the childish desire for certainty and fixity in a changeable and difficult world.

Much the same may be said about the abstract word *democracy*. The relationships represented by this word are those which the citizens of a country bear to each other and to their government. These relationships distinguish an autocratic country from a democratic one. It must however be admitted that one man's thoughts on these relationships will certainly not be the same as another man's. The resemblance between A's thoughts and B's thoughts is close enough to make the word *democracy* useful in discussion, though not close enough for them always to avoid controversies about what it "really means." An abstract word has no "correct meaning," never has had one, never will have one, and in the nature of things never can have one. For the lawyer, semantics has no more useful lesson.

It is a lesson that is very far from being universally understood, by lawyers or anyone else, as will become clear enough in the course of this book. One fallacy prevalent among the learned is that the "true" meaning of a word can be discovered from the derivation, and that the word *radical*, for instance, "really means" someone who wants to get to the root of things. An amusing exploitation of the fallacy is quoted by Wellman in *The Art of Cross-Examination*. A young man who had been injured in a railroad accident was examined by the railroad doctor, who declared that the injury to his nervous system was merely hysterical, and would probably disappear in a short time. The cross-examination of the

doctor by the patient's counsel, Benjamin F. Butler, is recorded as follows in Butler's autobiography:

Mr. Butler: Do I understand that you think this condition of my client wholly hysterical?

Witness: Yes, sir; undoubtedly.

And therefore won't last long?

No, sir; not likely to.

Well, doctor, let us see; is not the disease called hysteria and its effects hysterics; and isn't it true that hysteria, hysterics, hysterical, all come from the Greek word *ὑστέρα*?

It may be.

Don't say it may, doctor; isn't it? Isn't an exact translation of the Greek word *ὑστέρα* the English word "womb"?

You are right, sir.

Well, doctor, this morning when you examined this young man here, did you find that he had a womb? I was not aware of it before, but I will have him examined over again and see if I can find it. That is all, doctor; you may step down.

Since, however, language has to be put to practical use, and since the interpretation of the laws is the duty of the courts, lawyers and judges are frequently obliged to make estimates, which may afterwards have the force of law, as to the "true" meaning of certain words and phrases. Unfortunately, the situation to which the law has to be applied is seldom one that could have been in the minds of the legislators who framed it. In the eighteenth century, for example, lawmaking bodies could not have foreseen that their laws would have to be applied to the distribution of electric power. The court has then to decide how they would have intended the law to apply if they had been acquainted with the situation. The

task of making such decisions may be one to exercise the keenest intellects in the profession. Before giving examples of the efforts of advocates to interpret words in some desired sense, we may quote passages from two masterly judicial interpretations, made by Justice Holmes, of phrases in the Constitution of the United States.

The first, delivered when Holmes was a justice of the Supreme Court, deals with the constitutional guarantee of "the equal protection of the laws." The question to be settled was, whether the state of Virginia had the right to sterilise mentally defective patients in an asylum. The court decided that it had. *Buck v. Bell*, 274 U.S. 200 (1927); Holmes, J., for the Court:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped by incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

A careful reader will not fail to note the sarcasm in the final sentence of this opinion.

The second specimen of Holmes's interpretations of the Constitution dates from 1901, when he was Chief Justice of the Supreme Court of Massachusetts. In 1898 a statute had been passed in Massachusetts which replaced hanging by electrocution. The first criminal to be sentenced to death after the enactment of the statute appealed, on the ground that the Constitution of the United States forbade "cruel and unusual punishments" and that electrocution was unusual. Penal electrocution, as a novelty in Massachusetts, incontestably was unusual, but the Court held that *unusual* must be taken with *cruel*—an excellent example of the principle that meaning depends on context. *Storti v. Commonwealth*, 178 Mass. 549 (1901); Holmes, C. J., for the Court:

The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true the statute is invalid, but it is said that it is not true, and that you cannot separate the means from the end in considering what the punishment is, any more when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death but for the purpose of causing other pain to the person concerned. The so-called means is also an end of the same kind as the death itself, or in other words is intended to be a part of the punishment. But when, as here, the means adopted are chosen with just the contrary intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, we are of opinion that they are not forbidden by the Constitution although they should be discoveries of recent science and never should have been heard of before. Not only is the prohibition addressed to what in a proper sense may be called the punishment but, further, the word *unusual* must be construed with the word *cruel* and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts.

Forensic ingenuity of the same type, though applied to a less tragic situation, appeared in the *New Yorker* of December 7, 1946, in an account of the well-known New York law firm of Howe and

Hummel. The firm was retained to defend three Philadelphia gypsies who had been arrested for performing a *danse de ventre*, described as a "lewd and lascivious contortion of the stomach." The stomach, however, said Hummel, was merely a small sac in the abdominal region, whose contortions, if any, could not be perceived except from inside the body. The case was dismissed.

The meaning of a word may be completely altered by differences in tone and emphasis, and these differences, if made clear by an able lawyer, can sometimes change the whole complexion of a case. Sir Edward Marshall Hall delivered some wonderfully acute expositions of this sort, recorded in the biography by Edward Marjoribanks, *For the Defence*. In 1900 he appeared at the Assizes at Guildford, near London, to defend a young unmarried woman on the charge of murdering her baby. She had been seduced by a married man, and before the birth of her child she left her home and found work as a laundress in another part of England. The child died ten days after birth, probably from being accidentally overlaid by the mother. She put the body in a box and left the neighborhood, but she was traced, and to the detective who questioned her she said, "I will tell you the truth. I killed it—I did not know what to do with it—I put it in a box; you will find it there." The body was found, and the mother was charged with willful murder, which she confessed to the police inspector who charged her—or so said the prosecution. Under cross-examination, however, the inspector admitted that he had never charged her with the willful murder of the child, but merely with causing its death. But the prisoner had to explain still another, and a more serious, admission. Shortly before taking the child up to bed with her on the last night of its existence, she said to the nurse who was sitting with them, "How can anyone get rid of a baby?" Marshall Hall's virtuosity in presenting the true meaning of these two admissions is a beautiful example of what can be done by a lawyer sensitive to the possibilities of the spoken language.

By cross-examination of the nurse he showed that the actual words used by the prisoner were "How can anyone get rid of a little

baby like this!," and that the stress fell on the word *can*. The nurse also agreed that when the words were spoken the mother was kissing and fondling and actually feeding the child, behavior which, when taken with the altered stress of the sentence, made it seem most improbable that she was asking for advice as to how to murder it. The meaning of the admission to the detective is altered by a change in punctuation: "I killed it. I did not know what to do with it; I put it in a box." If the sentence "I did not know what to do with it" goes with "I put it in a box," the admission is much less detrimental than if it goes with "I killed it."

Marshall Hall's defence convinced the judge. "There is no doubt," said the judge, "that the prisoner was fond of her child. In the whole of my experience I have never known a case where accent had greater significance. I confess that when I read the depositions taken at the inquest I thought the girl's words were meant as an enquiry, but what Mrs. Deaker said before the magistrates was exactly consistent with what she said this morning, namely, 'How *can* anyone get rid of a baby like this!' with the accent on the 'can.' This puts an entirely different complexion on the matter. With regard to the prisoner's admission to the police-inspector, that is a very serious illustration of the difference punctuation may make to the meaning of words. 'I killed it—I did not know what to do with it.' If you make a pause there, and then go on, 'I put it in a box,' the phrase is an ugly one, inasmuch as it is perfectly consistent with, 'I killed it *because* I did not know what to do with it.' If, however, you pause after 'I killed it,' and proceed, 'I did not know what to do with it, and I put it in a box,' the import of the phrase is not nearly so serious." The jury found the prisoner not guilty without leaving the box.

The second example from Marshall Hall's cases, though less striking as a specimen of his skill in interpretation, is interesting as the first case to bring him prominently into public notice. In March 1894 he was called on to defend an aging London prostitute named Marie Hermann on the charge of murdering one of her clients. In earlier life Marie, who was Austrian by birth, had been a governess,

but she had taken to prostitution to support her three children, one of whom was blind.

On the night of March 15, 1894, she was accompanied to her room near the Tottenham Court Road by Henry Stephens, a retired cab-owner over seventy years of age. At about eleven o'clock the tenants of the floor above—a mother and her daughter—heard voices loudly raised in anger from Marie's room. After an interval there was a great crash. The daughter (who was dressing for a dance) went on to the landing to listen, and heard a man's voice say, "Murder, murder, murder." She left the house to go to her dance, but as her mother walked downstairs she heard the man repeat: "My five pounds, give me that five pounds." A woman's voice replied: "I give you account of the five pounds presently." A sound of washing was heard, and then the woman's voice continued: "I'll get you brandy, you'll soon be better. I'll *make* you better." After that Marie Hermann crossed the street to buy a bottle of brandy from a public house. Later, about half an hour after midnight, there was another loud crash, and the woman was heard to say, "Did you hurt yourself, dear? . . . Speak! Speak! Speak!" The word was uttered in loud rising tones, the last time almost in a shriek. Three hours later there was another loud crash, and the noise of splintering wood. Next morning the sink used by all the tenants was found to have been stained with blood. The same day, Mrs. Hermann gave notice that she intended to leave, and a large corded trunk was seen ready for removal. Events had, however, aroused the suspicions of her fellow-lodgers, and when on the following day she moved to new rooms she was questioned by the police, to whom in her professional capacity she was already well known. Her replies being judged unsatisfactory, the trunk was forced open, and disclosed the body of Henry Stephens. He had been killed by a number of blows on the head.

Marie Hermann maintained that the man had made a drunken attack on her and that she had defended herself by striking him on the head with the poker. She said that after the struggle she had gone out to buy brandy for him, and that on the following morning

he had still been alive, but had later died in his sleep. In support of this story was the evidence of twelve bruises that the prison doctor found on Marie's neck, but the number and severity of the wounds on the dead body told against her; so did the overheard snatches of conversation; and so did evidence, given by the son of the dead man, that his father had drawn fifty pounds from the bank shortly before his death. It was proved that on the previous day Marie was in need of money and that on the following day she was spending freely.

The medical evidence for the Crown was offered by three doctors. In his cross-examination of Dr. Taylor, Marshall Hall asked him:

Do you believe that an old man of seventy-one years of age, after he had been struck seven times in rapid succession with a crowbar, which inflicted wounds sufficient to cause death, would have the strength left to have inflicted those bruises on her throat?

No, I do not.

This answer substantiated the theory of the defence that Marie had struck the dead man after his attack on her, and not before. Marshall Hall was also able to make some headway with the jury by enlarging on a slight disagreement between two of the doctors, of whom one believed that the worst blow, over the right ear, had been delivered from behind, while the other said that it had been struck from above while the victim was sitting down. "If you convict this woman of murder," said Marshall Hall in his closing speech, "it will be on the opinion of one medical man." His most effective passage, however, dealt with the interpretation of the triple ejaculation "Speak! Speak! Speak!" He argued that the words were spoken not in anger but in the woman's desperate anxiety to reassure herself after the frenzied blows she had struck in self-defence. "Is there a person who would believe that a woman who had inflicted such terrible injuries, and had awakened to the consciousness of what she had done, could speak in terms of passion to

her victim? My explanation of this incident is that her poor disordered mind had seized on the fact that the man was dead, and prompted by womanly instinct, was endeavoring to do what she could to succor him." It is said that this argument carried considerable weight with both judge and jury, and Marjoribanks declares that Marshall Hall's interpretation of the words, by slightly changing the tone and accent given by the witness, was probably the turning point of the case. The judge summed up in favor of a manslaughter verdict, and the jury followed him after only fifteen minutes' consideration, adding a strong recommendation to mercy, to which the judge scarcely gave effect in sentencing the prisoner to six years at penal servitude. He was influenced by the steps that she had taken to dispose of the body.

The Hermann case received great public attention, and made Marshall Hall famous as a defence counsel in murder trials. No small part of his success came from his verbal ingenuity, and he rarely failed to make the most of opportunities offered him by chance or the witnesses. One such opportunity came during the Hermann case. The son of the dead man was in the witness-box, and Marshall Hall was cross-examining him in an endeavor to show that the fifty pounds that his father had drawn from the bank had mostly been spent, before he met Marie, at a house in Albany Street to which he had been traced. After the following passage in the cross-examination, Marshall Hall had no difficulty in discrediting the son with the jury.

Was not this house a disorderly one managed by your mother?

It might have been or it might not have been.

Don't you live with one of the women at Albany Street?

No.

Don't you live with Amy Chase?

No.

Will you swear that?

Am I bound to answer that question?

The Judge: Yes, I think you must answer.

The witness: No, I was not living with her, she was living with me.

The distinction between living with a woman, and having a woman live with you, is not wholly imaginary, and all through this book it will be necessary to deal with distinctions that can be hinted at, stated, or concealed by a dexterous choice of words.

Lawyers are not the only people to use this dexterity. Indeed, the art of putting things in a favorable or unfavorable way is practised by almost everybody. The advertisers encourage us to spend by telling us to *save* by buying from them. The Treasury is not so thoughtless as to demand a tax on bachelors, since an allowance to married men has the same result and sounds pleasanter. The art of expression and the art of interpretation are complementary.

Lest the reader should grow weary of further random specimens of forensic ingenuity of interpretation, some continuity may be given to the discussion by a study of the meaning of a single word—*freedom*. Justice Holmes, who thought and wrote much on this subject, will provide most of the material.

Freedom suffers from the vagueness of other abstract words, and in the course of the centuries has become encrusted with such diverse emotional growths as to be far from simple in its meaning. Like its synonym *liberty* it is more often used to arouse emotion than to convey information. It comes to the mind in such phrases as *Let freedom ring* and *Give me liberty or give me death!* There is no doubt, however, that *freedom* means absence of restraint; the arguments begin when we enquire to what restraints a man may still be subjected when freedom of a certain kind has been guaranteed to him, e.g., by the United States Constitution. That is what the courts have had so frequently to decide.

There are many, though not perhaps in the courts, who by *freedom* mean the absence of all restraints except those that they approve of. Such are the people who use the old phrase "liberty not licence"; *licence* being the freedom to do things that they do not approve of. Thus Professor Edward S. Corwin, in his book *The Constitution and What It Means Today*, discusses the First Amendment, which runs as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

On freedom of speech and press he roundly says:

"Freedom of speech" and "press" may be defined as the right of fair discussion of public men and measures. Such a right is absolutely indispensable to a republican form of government such as ours. But *freedom* of utterance is not *license* of utterance, and it is only the former which is protected by this Amendment.

Preachers, too, are apt to tell us, in the words of one of the Collects, that God's service "is perfect freedom." Now though no one would wish to say anything in disparagement of God's service, it must be pointed out that insofar as it is service it is not freedom, *service* and *freedom* being, by definition, contradictory terms. *Whose service is perfect freedom* is a phrase that expresses an attitude; it does not convey information. *Whose black is pure white* would be quite as logical.

A similar distortion of the meaning of this uncompromising word was shown by posters circulated during World War II which illustrated "the four freedoms." The "Freedom from Want" poster showed a farmer's wife serving a turkey dinner to her family. Farmers' families, however, are in no need of protection from want, and a poster urging people to see that they get enough to eat is unnecessary, besides being pernicious in distracting attention from

others who actually may be hungry. The "Freedom of Speech" poster showed a young man making an address which, to judge from the faces of his audience, was well-thought-of by all of them. But the people who need freedom of speech are those whose words are unwelcome, and who without such freedom may be prevented from making themselves heard. A poster designed with the sincere purpose of encouraging such freedom would show a Communist making a speech in America, or an exponent of free enterprise making a speech in Moscow, or Bertrand Russell delivering a lecture in an American college. No one can say that such freedom is so well established everywhere that it needs no support. There never has been a country where it was safe to say things strongly disapproved of by public opinion, though in modern democratic countries, at least in time of peace, speakers have often had more to fear from the passive resentment of their neighbors than from mob violence or the law. Holmes put the point with his usual force in his dissenting opinion in *U.S. v. Schwimmer*, 279 U.S. 644, 653 (1928). In this case the Supreme Court, by a majority, denied naturalisation to a woman who professed herself unwilling to bear arms in defence of the Constitution. Holmes said, in part:

If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

Even a little consideration will show that the community cannot allow a man's freedom of action to be entirely unrestricted. Nearly a hundred years ago J. S. Mill wrote that a man's exercise of his freedom must not be such as to restrict the freedom of others, and Herbert Spencer wrote: "Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors." We are not free to imprison our enemies, or to sell white arsenic labelled "Baking Flour." Indeed, in all civilised communities the necessary restrictions are found to be much closer

than these extreme examples might suggest. As Holmes said in *Lochner v. New York*, 198 U.S. (1905) 45, 74:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

Life in a modern community has become so complicated that the state is obliged to compel the cooperation of citizens in carrying out projects for the common good. Again, restrictions imposed by economics may make the freedom allowed by the law an illusion. As Chief Justice Stone wrote in his dissent in *Morehead v. Tipaldo*, 298 U.S. 587 (1936):

There is a grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together.

From the discussions of the meaning of freedom of speech, we shall choose parts of two famous Holmes opinions. In *Schenck v. U.S.*, 249 U.S. 47 (1919), Holmes wrote for the Court:

But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.

The second passage comes from Holmes's dissenting opinion in *Abrams v. U.S.*, 250 U.S. 616, 624 (1919). Of this opinion it is

said by Max Lerner in his book *The Mind and Faith of Justice Holmes*, to which this chapter is much indebted: "I can add little to what has been said in comment on Holmes's language. It has economy, grace, finality, and is the greatest utterance on intellectual freedom by an American, ranking in the English tongue with Milton and Mill."

Abrams was a Russian immigrant who threw from a roof in New York City some leaflets condemning American intervention in the Russian Revolution. He was tried under the Espionage Act and given a sentence of twenty years' imprisonment, a conviction that the Supreme Court (Holmes and Brandeis dissenting) affirmed. Holmes wrote, in part:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I

regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

A complication that arises early in studies of interpretation is the existence of distinct but not separate meanings for the same word. By using these two meanings in the same passage, writers sometimes confuse both themselves and their readers, at other times secure intentional effects that could scarcely be achieved in any other way. Thus A. E. Housman's well-known lines about the laws of God and the laws of man gain a special pungency from the different senses of the word *law*. Of the three chief meanings of *law*, however (the *law* of the courts, natural *law*, and moral *law*), the last two are the most often confused. In one part of his argument a writer discusses the *laws* of nature. In this sense the word *law* means some regularity in the results of experiments made by scientists. In another passage he writes of the moral *law*. Now *law* in this sense is a set of rules drawn up by moralists. There is an important difference between scientific laws and moral laws, for whereas scientific laws are valid at all times and places, moral laws are different in every environment. Thus the law of conservation of energy is as true in one part of the world as in another, and can be tested even by observations on the motion of other planets. This is by no means true of the moral law, if this law be defined as the standard of behavior most acceptable to the leaders of the community. What is wickedness in one part of the world is virtue in another, and behavior which is commendable one year receives a jail sentence the next. Lying and homicide are virtues in wartime, if carried out for ends approved by the community, but in peacetime these virtues become sinful. And there is probably no behavior which in contemporary Western civilisation is now held criminal in time of peace that is not thought in some part of the world to be virtuous. Even if the term be confined to the moral law traditional in the Jewish and Christian worlds, great differences will be found between the law as it was defined by Moses and as it is

accepted now; nor would a modern moralist be in complete agreement with a seventeenth-century New England Puritan who considered one of his important moral duties to be the detection and burning of witches.

It is true that moralists of all periods and persuasions have consistently refused to acknowledge that there are any genuine variations in the moral law. Every moralist believes that the moral law as understood by himself is *the* moral law (just as the law of gravity is *the* law controlling falling bodies), and that apparent variations are due to misunderstanding by those not of his persuasion. Few serious writers would indeed maintain that the dependence of moral law on circumstances means that any one interpretation is as good as any other, or that all interpretations are necessarily imaginary, superfluous, or mistaken. It is enough to state, what cannot be contradicted, that the moral law, as defined in different circumstances, shows extremely wide variation, whereas scientific laws do not; that the use of the same word *law* to denote both of them is a possible source of confusion; and that this confusion may be taken advantage of by careless or dishonest speakers and writers.

The word *science* is another that may shift its meaning. *Physical science* is the study of all material things that are not alive. This kind of science follows exact laws (scientific *laws*, not moral *laws*), and enables predictions to be made of the results of experiments. The growth of physical science in the last century or two has had such striking effects on our way of living that the word *science*, when used as a short form of *physical science*, gives prestige to its context. Advertisers, who can be relied on to know what the masses are thinking, like to use it in their copy, as when they assure the public that "scientific tests" have proved their merchandise to be the best. Few people now believe anything that they read in advertisements beyond readily demonstrable statements of fact, but advertisers are not the only people who like to associate themselves with this fashionable word. Studies such as economics, history, or sociology may be described by those interested in them as *social*

sciences. This practice is misleading because it conceals the essential differences between studies such as economics or history on the one hand and physics or chemistry on the other. Economics is not subject to exact laws, and reliable predictions cannot be made of the economic results of given situations. For this reason, the study of economics and the study of science require different abilities. Few men attempt or achieve eminence in both fields, and there is little to be gained by describing both of them by the same word.

An instructive example of this confusion between *physical science* and *science* in its other meanings is to be found in a recent book on semantics written by a psychologist. This author naturally thinks of his own subject, psychology, as a science, and describes *scientists* as "those who study and write about people and the world in which they live." This perhaps is not very useful as a definition, since it is difficult to guess what other subjects there are that could be written about (perhaps astronomy and theology?), but the notion that scientists study and write mainly about *people* is one that would astonish a physicist or a chemist, who regards a scientist as one who studies and writes about *things*. That the author of our quotation is confused about his own use of the word can be seen from the examples he gives of eminent scientists. He names Newton, Russell, and Einstein, of whom Russell, who alone is eminent outside the physical sciences, is certainly more distinguished as a mathematician than as a writer on social subjects.

It should not be thought that the study of multiple meaning is a mere semantic game. One of the best ways to get a firm grip of the outlines of a subject—and who has to do this more often than a lawyer?—is to think about the possible definitions of what seem to be the important words used in it. If a man writes an article for a church magazine on "Why I Believe in Christianity," he will write much better if he first decides in what senses he understands the words *believe* and *Christianity*. Merely the two most usual meanings of each of these words are enough. *Christianity* may mean either the account of Christ given in the Gospels and inter-

preted by the Christian churches, or the system of morals advocated by Christians. One can *believe* in something either (*a*) by thinking it is true; or (*b*) by thinking it is useful. Examples of (*a*) are: "I believe he is innocent," and "I believe we have lost the way"; whereas examples of (*b*) are: "I believe in beginning as I mean to continue," and "I believe in bicarbonate of soda for indigestion." The meaning that a reader chooses for *Christianity* is likely to depend on the meaning that he chooses for *believe*, since a person who believes in Christianity in sense (*a*) thinks that the account of Christ given in the Gospels is essentially true, whereas if he believes in sense (*b*) he is merely expressing his sympathy with Christian morals. The difference is not trivial, for it is quite possible to be heartily in favor of Christian morals and of the influence of Christianity in the world while supposing the biblical accounts of Christ to be false.

Readers who have followed these distinctions so far may be amused to try their new semantic skill at detecting the fallacy in the following paragraph. It depends on a shift in meaning of the word *conservative*. What two definitions are implied?

Do people grow more conservative as they grow older? There is a common impression that they do, but it must surely be mistaken. For to be conservative is to retain one's opinions, and conservative people are those who keep when they are old the opinions that they adopted when they were young.

That several important legal terms have multiple meanings is by now pretty well understood. But this was not so in 1897, and Holmes showed himself to be abreast of the most advanced thinking of his time in the address which he delivered at the dedication of the new hall of the Boston University School of Law on January 8, 1897 (10 *Harv. L. Rev.* 459, 463 (1897), quoted by Lerner, *op. cit.*). He deals among other things with the words *malice* and *rights*:

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to

take malice as it is used in the law of civil liability for wrongs—what we lawyers call the law of torts—to show that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. Three hundred years ago a parson preached a sermon and told a story out of Foxe's *Book of Martyrs* of a man who had assisted at the torture of one of the saints, and afterward died, suffering compensatory inward torment. It happened that Foxe was wrong. The man was alive and chanced to hear the sermon, and thereupon sued the parson. Chief Justice Wray instructed the jury that the defendant was not liable, because the story was told innocently, without malice. He took malice in the moral sense, as importing a malevolent motive. But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant's conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.

This is what Justice Holmes said about *rights*:

The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights

of man in a moral sense are equally rights in the sense of the Constitution and the law.

It would be difficult to find more lucid expositions than these. It will be noted that Holmes not merely points to the confusion caused by the use of *malice* and *rights* in their moral and legal senses, but in each passage clearly indicates the effect that language has on our view of the law. Simpler examples of the same thing can readily be found in the language of everyday life. The word *strong*, as applied to the human body, means both the ability to exert great force and the ability to resist disease. The two are not closely connected, though people are led to think that they must be because they are expressed by the same word. So professional athletes are puzzled because they become ill as often as anybody else, and schoolmasters try to improve the health of their pupils by teaching them all to play football. The word *cold* is another trickster. Because the same word denotes catarrh (or whatever the current name is for a cold in the head) and also low temperature, people believe that they catch a cold in the head by going to cold places. The present writer has an immeasurable respect for the medical profession, some of whom (if he is not mistaken) encourage and perhaps even share this view, but observation of his own health has convinced him that people catch cold not so much by going to cold places as by congregating in hot, crowded, stuffy ones. Again, many quite intelligent people believe that the eyes can be "worn out" by excessive use, and that if one eye is lost, the other is likely to get weak because it has to "work harder," though no one thinks the same of the ears or the legs: we do not grow deaf by assiduous attendance at concerts, or lose the use of our legs by taking too many long walks. The confusion here comes from the application of the same words, *to wear out*, both to the eyes, which have the recuperative power of living things, and to inanimate objects, which have not.

Several other words that can cause trouble do so because of this indiscriminate application to living and non-living things.

Young and *old* are among them. Institutions, races, nations, and civilisations can be young or old, but it is not at all certain that the consequences of old age for a civilisation are the same as those for a man. To be specific, an old civilisation is not necessarily feeble. Some fashionable interpretations of history, however, have unmistakably been influenced by this fallacy, by the notion, that is, that a civilisation is vigorous in its youth, firmly established in its middle age, and afterwards feeble (*effete* is a favorite word with the victims of this error). Charles A. Beard and Mary R. Beard, who have no illusions on this topic, write as follows (in *Basic History of the United States*) about American foreign policy in 1895:

Within a short time the agitators' program for America's thrust into world-power politics was well formulated and contained the following propositions. The United States, long an infant nation, had "grown up," had become "adult," must cast off the provincialism of its youth and, as a grown man, press into the grand game of power politics played by the grown men—the "big men"—of Europe and Asia. To continue in the old ways at home would be childish.

Among the most influential writers on this subject (the effect on our thinking of the language that we express it in) is Korzybski in his book *Science and Sanity*. Korzybski points to what he calls the different levels of abstraction in our discourse. When from our experience of particular men we form a conception of *man* in general or *mankind*, passing from specific objects to higher levels of abstraction, we leave behind us on the way any properties that specific men may possess, and reach a conception, *mankind*, which is not merely an abstraction formed from our mental conceptions of specific individuals but is different in kind from any of them. There is no such thing as *a cow*, says Korzybski; there are merely cow₁, cow₂, etc. We cannot attempt here to follow all the consequences of this way of looking at language (Korzybski's book should be consulted by those interested), and must content ourselves with a single illustration of what may be summarily de-

scribed as the perils of generalisation. Suppose that you are a European who during World War II suffered from the invasion of the German army. As you look back on that frightful period, you have a mental image of "the German" with which are associated all the painful feelings that come to you when you recall those times. The "German" frightened you and ill-used you; he threw your little sister down a well, carried your friend to forced labor, sent your old uncle to a concentration camp. This hateful and terrifying person could be in several places at once; he could be executing hostages in your village while taking part in a pogrom in Poland. Moreover, he was immortal; though once you were able to shoot him dead from behind a tree, yet there he was the next day just as live and as horrible as ever. But as you think more clearly of this person, you realise that he is not real at all; that he has few of the qualities of real Germans—German₁, German₂, etc.; and that he is a high-level abstraction far removed from them in every way. Unfortunately, however, when you think of Germans in general it is this factitious person that comes into your mind. He influences your thinking about history and politics; about everything, in fact, with which Germans are concerned. Similar misconceptions may color the thinking of an American about "the Jew" or "the Negro." The first step to a remedy is to remember the level of abstraction at which one is operating, and not to mistake high-level abstractions for real things.

Other troubles arise when we give names to processes or ways of behaving and then, because they have names, regard them as things. A man's *digestion*, *character*, and *mind* are examples, but the exploration of this field has not much to do with the law. Whether our thinking about the *soul* has been influenced by the existence of a word for it is a question that we may, perhaps gladly, leave to the theologians. With such words as *ownership*, *property*, and *possession* the law is undoubtedly concerned. Holmes was keenly conscious that these high-level abstractions might lead to faulty thinking, and, in particular, might suggest a too extended meaning for the word *property*, in the Fifth Amendment, which

guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." A business, he explains in the following passage from his dissenting opinion in *Truax v. Corrigan*, 257 U.S. 312, 343 (1921), is not so much like a *thing*, such as land, as like a *process*, or set of goings-on—"a course of conduct."

Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm.

This thought was not a new one to Holmes. In 1913, in a speech at a dinner of the Harvard Law School Association of New York (quoted by Lerner, *op. cit.*, p. 387), he referred to the dangers of thinking of ownership as a thing instead of concentrating attention on the things owned:

We are apt to think of ownership as a terminus, not as a gateway, and not to realize that except for the tax levied on personal consumption large ownership means investment, and investment means the direction of labor towards the production of our greatest returns—returns that so far as they are great show by that very fact that they are consumed by the many, not alone by the few. If I may ride a hobby for an instant, I should say we need to think things instead of words—to drop ownership, money, etc., and to think of the stream of products; of wheat and cloth and railway travel.

"We need to think things instead of words." What Holmes means here is what Korzybski means—that to get a clear view of things we should try to see them as they are, and not in the form of verbalised abstractions from which the properties of real things have disappeared.

The Two Forensic Styles

CHAPTER III

THE DIFFERENCE between abstract and concrete words was described in the previous chapter. When meaning has to be made as clear as possible, the vagueness that always goes with abstract words should not be forgotten, and the meanings of these words should be tied down by frequent examples of what they refer to: examples that are constituted not of other abstract words, but of words that can be defined by pointing or pantomime. Here is a passage from Thoreau's *Walden* in which we are exhorted to live more simply. He wrote it a hundred years ago while living in a hut that he had built for himself on the shore of Walden Pond, near Concord, Massachusetts. It will be noticed that he continually refers to examples on whose meaning everyone would agree, so that the reader is never left in doubt as to what he means by such abstractions as *simplicity* or *improvements*.

Simplify, simplify. Instead of three meals a day, if it be necessary eat but one; instead of a hundred dishes, five; and reduce other things in proportion. Our life is like a German Confederacy, made up of petty states, with its boundary forever fluctuating, so that even a German cannot tell you how it is bounded at any moment. The nation itself, with all its so-called internal improvements, which, by the way are all external and superficial, is just such an unwieldy and overgrown establishment, cluttered with furniture and tripped up by its own traps, ruined by luxury and heedless expense, by want of calculation and a worthy aim, as the million households in the land; and the only cure for it, as for them, is in

a rigid economy, a stern and more than Spartan simplicity of life and elevation of purpose. It lives too fast. Men think that it is essential that the *Nation* have commerce, and export ice, and talk through a telegraph, and ride thirty miles an hour, without a doubt, whether *they* do or not; but whether we should live like baboons or like men, is a little uncertain.

It is easy enough for a man to keep away from abstract words if he is writing about postage stamps or the care of the horse. But Thoreau was writing about generalities—how men ought to live—and the specific nature of his instructions is something that even better writers have not always been able to imitate. Thoreau is widely read today (and the reputation of few American authors is growing so surely) not only because his ideas are important to this generation, but also because they are expressed in words forever rooted in the firm soil that we can touch and see. But to set against the Thoreau passage, here is a quotation from a contemporary and perhaps not less influential writer—Ralph Waldo Emerson—in which the meaning suffers because the author has taken so little trouble to tell us what is to be understood by the abstract words that he uses.

Life only avails, not the having lived. Power ceases in the instant of repose: it resides in the moment of transition from a past to a new state, in the shooting of the gulf, in the darting to an aim. This one fact the world hates; that the soul *becomes*; for that forever degrades the past, turns all riches to poverty, all reputation to a shame, confounds the saint with the rogue, shoves Jesus and Judas equally aside. Why then do we prate of self-reliance? Inasmuch as the soul is present there will be power not confident but agent. To talk of reliance is a poor external way of speaking. Speak rather of that which relies because it works and is. Who has more obedience than I masters me, though he should not raise his finger. Round him I must revolve by the gravitation of spirits. We fancy it rhetoric when we speak of eminent virtue. We do not yet see that virtue is Height, and that a man or a company of men, plastic and permeable to principles, by the law of nature must overpower and ride all cities, nations, kings, rich men, poets, who are not.

It is true that this passage is easier to grasp after a study of the whole essay ("Self-Reliance") from which it is taken. But however it is read, the vagueness of the references is sure to give trouble, or, worse, to persuade the reader that he has understood the passage when he has not. After absorbing a page or two of Emerson written in this way, the reader will find it instructive to close the book and to attempt a summary, in writing, of what has been said. The attempt is likely to be disheartening. On all but the most careful readers Emerson's prose, when he writes in his vague manner, leaves but a fugitive impression of what the words mean. If his sentences are scrutinised, it is found that in many of them no difference would be noticed if the word *not* were inserted or if the meaning were reversed in some other way. "Life only avails, not the having lived." "Only the having lived avails, not life." Because the word *avails* is left undefined (*avails whom? for what purpose?*), either of these two sentences seems to have as much meaning as the other, and in the context it is the second version, which Emerson did *not* write, that seems to agree better with the sentence that follows it ("Power ceases in the instant of repose" . . .). Similar uncertainties arise on many pages of Emerson's essays, and it may be surmised that if he left any crucial misprints in them at his death they may have remained undetected. After reading some of these passages, a man is left with an impression of earnestness and moral grandeur, but no definite opinions that he could put into writing. This defect is not inevitable in moral discussions. Consider the didactic passages in the Gospels. Christ always makes His meaning clear with examples or parables, and after reading one of His discourses with attention a reader need have no difficulty in writing a few sentences to explain the meaning of what has been said.

There is another difference between the Thoreau quotation and the Emerson quotation—and this brings us back to the law. Thoreau is (in this passage) mainly factual; Emerson, mainly emotive. Each wants to persuade us, but whereas Thoreau wants us to behave in a certain manner, Emerson is more anxious to

encourage certain feelings in us. The difference is important. If a speaker wants to keep the attention of his audience on a particular set of facts, he should use concrete words; if he wants to concentrate on their feelings, he should avoid them. Thoreau stimulates our thoughts; Emerson, our emotions. It is unfortunately true that these words *thought* and *emotion*, which will have to be used often in this chapter, are only crudely descriptive of the processes referred to. They are used for want of more satisfactory terms. A mathematician or scientist, when engaged in his characteristic pursuit, thinks; a person affected by music, or by a beautiful object, or in love, feels emotion. For a lawyer, then, who is trying to get a verdict from a jury, the distinction comes to this: if he wants the jury to decide on the grounds of the facts of the case, he should make his language concrete; if he wants them to decide on the grounds of their emotions, he should make his language abstract. (By concrete language is meant language in which the abstract words, if there are any, are constantly explained or exemplified by reference to concrete words.) Distinctions in these matters cannot be drawn with the sharpness so convenient in physical science. But it may be said that the language of persuasion falls into two categories, concrete and abstract; that the mood induced likewise falls into two categories, of which one is mainly a matter of thinking and the other mainly a matter of feeling; and that each kind of language goes roughly with one kind of mood. A further description of these categories will now be undertaken, to be followed by illustrations from the courts.

Language will be taken first. It may be (*a*) concrete or (*b*) abstract, and it may also be (*a*) exact, precise or (*b*) vague. "On December 17, 1947, he made the defendant an unsecured loan of two thousand five hundred dollars at two per cent interest," or "That winter he gave the defendant financial assistance on generous terms." Language may be (*a*) specific and particular or (*b*) general. "He told the plaintiff he would shoot him if he caught him speaking to his daughter again," or "He discouraged the attentions of the plaintiff to his family." Most of us have been admon-

ished by our English teachers to be specific if we want to be forceful. The advice is excellent, but our teachers probably did not contemplate a situation in which the object of language is to prevent our hearers from thinking too clearly about the objects of discourse. Finally, language may include (*a*) quantitative statements or (*b*) value judgments. This distinction has a chapter to itself; at this point a couple of specimens will suffice: "He paid fifty-two thousand dollars for the house," or "He paid an outrageous price for the house." It is to be hoped that the reader will agree that all the (*a*) characteristics overlap and that all the (*b*) characteristics overlap, though there seems to be no convenient single word in the language ready to denote either group. The terms *factual* and *emotive* will accordingly be used with extended meanings to indicate language of (*a*) and (*b*) categories respectively. *Factual* language in this sense is concrete, exact, precise, specific, particular, and, where such statements are relevant, expressed in quantitative statements rather than in value judgments. *Emotive* language in this sense is abstract, vague, general, and expressed in value judgments rather than in quantitative statements. These two kinds of language are the two main styles that can be distinguished in forensic English.

What of the moods that are to be induced? These are either (*a*) mainly thoughts or (*b*) mainly emotions, and the hearer may have his attention either (*a*) focussed on the facts or (*b*) distracted from the facts. He may have either (*a*) precise thoughts or (*b*) vague emotions. "Why did the defendant offer the policeman a hundred dollars?" he may think, or "It must be terrible to go to prison." He may have (*a*) cold and hard-boiled thoughts: "I suppose he has that fifteen thousand dollars hidden somewhere till he gets out." Or he may have (*b*) warm emotions. They may be warm and sympathetic: "Poor fellow, he probably never had a chance. What will his wife and children do if he goes to prison?" or they may be warm and hostile: "What a mean treacherous scoundrel the defendant is!" The hearer may have (*a*) logical thoughts or (*b*) irrelevant emotions. "Is it proved that this really

is the right woman?" or "She has a kind face and reminds me of my old mother." His mood may be (*a*) cynical or (*b*) optimistic, even religious (in the lowest sense of that word). "I suppose she puts on that innocent look every time she is brought into court," or "I can't believe that such a respectable-looking woman did such a dreadful thing. And even if she did, she certainly won't do it again if we let her off this time. After all, doesn't Christianity tell us to be charitable? And what does it say in the Bible about casting the first stone?" Finally he may be (*a*) critical and vigilant or (*b*) relaxed and receptive. "Why didn't counsel say anything in his speech about the policeman's testimony?" or "What a beautiful voice the defendant's lawyer has! It's a pleasure to listen to him, even if you don't pay much attention to what he says."

If these categories are pulled together, it may be said that the mood induced consists either mainly of (*a*) thoughts that are focussed on the facts, precise, cold, hard-boiled, logical, cynical, critical, and vigilant—*realistic* and *down-to-earth* are good summary words here—or mainly of (*b*) emotions that are distracted from the facts, vague, warm, irrelevant rather than logical, and optimistic, even religious. *Unrealistic* is not quite what is meant, but *up-in-the-air*, if that is the opposite of *down-to-earth*, will do. The (*a*) mood is on the whole induced by the factual style; the (*b*) mood by the emotive style.

It is probably too ambitious to be more definite than this. But some enquiry can be made into the thoughts and emotions likely to be aroused in courts of law, specially with the hope of finding out which style may be most useful in evoking them. Since the matters discussed in courts of law include all questions ever discussed anywhere, the investigation is impossible unless restricted to some situation taken as typical. An effort may therefore be made to imagine what may be the thoughts and emotions of a juryman as he tries to decide on a verdict in a criminal trial.

These thoughts and emotions may center on the alleged crime, on the persons involved (the defendant, the witnesses, the judge, and the counsel on both sides), or more generally on the law and

the relations between the defendant and the community. The attitude of a given jurymen towards a particular kind of crime derives mainly from his group-feelings and is less a matter of the intellect than of the emotions. In the South, for example, he is likely to have group-feelings about Negroes, specially in a case of an alleged assault by a Negro on a white woman. Feelings of antagonism between North and South may survive. If a defendant is charged with arson committed with the intention of collecting insurance, the prejudice against Jews in connection with this crime may count against him if he is believed to belong to the Jewish race. Insurance men who may be sitting on the jury are likely to have prejudiced views in any arson trial. In wartime, cases of espionage and sedition are tried with unreasonable (and emotional) severity. Pacifists on the jury, on the other hand, are likely to be sympathetic towards defendants charged with evading military service. Feelings of solidarity or hostility may be based on an endless variety of associations: race, nationality, religion, occupation, and others. These attitudes naturally extend to the personalities in court. They are mainly emotional. A lawyer who is afraid of their effect on his case should keep down the emotional tone; his remarks should be dry, cold, explicit, and closely directed to the fact; his style should be factual. But if he thinks that these feelings are going to work in his favor then he should do his best to produce a charged emotional atmosphere. It is an odd thing that the exact kind of emotion is not of the first importance: almost any emotion will do. Surprising as this may be, it is the explanation of some of the most successful forensic efforts. Once a lawyer has persuaded a jury to feel—a feat which often has the effect of persuading them not to think—then the facts lose their importance. *What* the jury are feeling seems not to matter. In the Greenville lynching case, for example, the defence lawyers made their many allusions to the Bible, as described later in this chapter, not with the object of claiming any special sanctity for their clients, but because the Bible is a convenient source of irrelevant emotion.

The thoughts and feelings that a jurymen may have about the

law and the community must be a matter for deeper investigation. We should not forget to put first an honest desire to do his duty as instructed by the Court, a desire that should be, and probably is, a matter of emotional as well as intellectual satisfaction to the jurymen. Then comes an understanding of the deterrent purpose of punishment: a wholly logical conviction that the punishment of crimes is the only effective method of preventing many people from committing them. If the crime is likely to become habitual (sex or narcotic offences, for instance), a jurymen may be convinced that the offender must be kept in prison for some time to prevent him from repeating it. This, too, is an opinion with which the emotions need have nothing to do. But in criminal cases a jurymen is likely to think of (and still more, to feel about) the trial as a contest between the defendant and the community. Whether thoughts and feelings on this topic are to be encouraged is a question that may have great importance for counsel on either side, so an attempt to find out what they may be is not out of place here. Though the concept of a struggle between the individual and society is more often raised by the defence than by the prosecution, it may work both ways. Let us first consider the thoughts and feelings on this subject that favor the prosecution.

It is possible to build up in the jury a conviction, emotional as well as intellectual, of the supreme importance of human institutions: the family, the state, the church, the law itself. These institutions were created by our forefathers with difficulty and have been preserved at the cost of sacrifice. They are valuable but precarious structures that require constant defence, even though individuals may have to suffer in the process. Since this way of looking at things is what chiefly distinguishes a conservative in politics from a radical, an appeal based on it is likely to be successful with a conservative jury. The mood is solemn and austere. In such appeals against a breach of the rules of the community the word *antisocial* is useful, with the implication that what is antisocial must be an infraction of law and morals.

Second, the law, which is a process, can be exalted by speaking

of it as though it were a person or a machine (that intermediate stage between animate and inanimate things). It is set up as something that is superior to individuals, and with whose operations human feelings must not be allowed to interfere. The attitude is represented in such phrases as "in the name of the law," for if the law is a person it must have a name, or "the majesty of the law," in which the law is vaguely thought of as a royal person. In the phrase "the law must take its course" it is thought of as a powerful machine that having once been set in motion cannot be stopped, and the mechanical analogy is explicit in the phrase "the machinery of the law," a description that recalls the mills of God, which, we remember, "grind slowly, but they grind exceeding small."

Finally, and on a less creditable level, though by no means negligible in practice, there is the desire for vengeance on an offender against society: a wish to punish him for the sake of making him suffer. Psychologists tell us that most explanations of the social necessity of punishment are mainly rationalisations of the desire for revenge. The crimes that we resent most strongly are those that we should most gladly have committed ourselves if we had been able to subdue our scruples and fears. These are the crimes that we are most eager to punish in others, and the juryman, as he votes for a verdict of guilty, is using the defendant as a scapegoat to carry the blame for his own unperformed iniquities.

On the other side, in favor of the defendant, come sympathy with the individual in his struggle with something bigger than himself and the natural human predilection for the underdog. These are connected with feelings of pity for human sufferings of any kind, and reluctance to be responsible, even by concurring in an unfavorable verdict, for the punishment of anyone. Such feelings are easily aroused if the defendant is abject in appearance and has obviously suffered much from the world's blows, and in these cases it is common for outright appeals to be made to them.

More subtle are the feelings of hostility towards human institutions as such. The theory that all human institutions are evil is the basis of anarchism as a political theory and is far more wide-

spread among reasonable persons than might be supposed by adherents of orthodox political creeds. It goes back a long way. In eighteenth-century Europe it produced the ideal of the noble savage or natural man, whose essential nature remains good unless it be corrupted by contact with civilisation. It has always been a favorite of the romantic writers, from Coleridge, who wanted to found a settlement on the banks of the Susquehanna River, to D. H. Lawrence, who thought Fort Myers Beach in Florida would be a better location. It was the whole political theory of Shelley, and it influenced some of the greatest literature of the nineteenth century. The hero of Tennyson's *Locksley Hall* was not alone, or even unusual, either in his hatred of the institutions of his day or in his desire to escape from them:

Or to burst all links of habit—there to wander far away
On from island unto island at the gateways of the day.

* * *

There methinks would be enjoyment more than in this march
of mind,
In the steamship, in the railway, in the thoughts that shake mankind.

There the passions cramped no longer shall have scope and
breathing-space;
I will take some savage woman, she shall rear my dusky race.

In American literature of the nineteenth century the theme is represented in the work of most of the great—Thoreau, Emerson, Bret Harte, and Melville among them—and in modern times, which have provided us with rather forcible evidence that our institutions are less nearly perfect than optimists might have supposed, the idea has sunk deep into the popular understanding. For many years now it has figured in popular literature, mainly in escapist stories about the South Seas or the old West, or in songs about uncrowded areas where the deer and the antelope play. It has been among the feelings to inspire much of the migration into

America from Europe, and is encouraged by the strong (though decreasing) individualism of American life. It is likewise connected with the feelings of the countryman for the city-dweller, and it animates such unconscious syllogisms as "city affairs are run by rascals; the law is a city affair: the law is run by rascals."

Now by those who think that human institutions are evil, the law is often the most deeply hated of all. It is artificial, its necessity often appears dubious, it is repressive, and it is often associated with personal misfortune. Shelley had good reasons of his own for hating the law, but he was not unique in his views when he wrote of "golden and sanguine laws which tempt and slay." More modern, but working in the same direction, is the determinist conception of human character: the view that a man is largely what society has made him, and that if he has had no chances—if his family life has been wretched and his childhood spent in a slum—it is unfair to punish him for being what he is. This view has perhaps a more solid intellectual foundation than those that have just been discussed.

These feelings that favor the individual in his battle with organised society can be of the utmost use to a defence lawyer who knows how to appeal to them. If he can divert attention from the question of fact (Is the defendant innocent or guilty?) to some question of value and feeling (e.g., Do I favor the defendant or the community in this struggle?), it may be necessary for him to do little else.

To complete this brief survey of a jurymen's mind we must mention feelings of another order—the irritation and resentment that he may possibly feel at being made to come to court, and at the delays, boredom, and frustration that may afflict him when he gets there. He may visit these feelings upon either side, and experienced lawyers suggest that it is prudent for an advocate who wishes to make friends of the jury to express some moderate sympathy with this impatience.

Readers of *Pickwick Papers* may remember the opening speech of Sergeant Buzfuz, who "began by saying, that never, in the

whole course of his professional experience—never, from the very first moment of his applying himself to the study and practice of the law—had he approached a case with feelings of such deep emotion, or with such a heavy sense of the responsibility imposed upon him—a responsibility, he would say, which he could never have supported, were he not buoyed up and sustained by a conviction so strong, that it amounted to positive certainty that the cause of truth and justice, or, in other words, the cause of his much-injured and most oppressed client, must prevail with the high-minded and intelligent dozen of men whom he now saw in that box before him.

“Counsel usually begin in this way, because it puts the jury on the very best terms with themselves, and makes them think what sharp fellows they must be. A visible effect was produced immediately; several jurymen beginning to take voluminous notes with the utmost eagerness.”

This is not a bad specimen of the emotive forensic style. As a perfect example of a defence lawyer—this time in real life and not in the imagination of a novelist—it would be impossible to improve on Clarence Darrow. This is what Hays says about him in *City Lawyer*: “Darrow would arise, shrug his shoulders. His posture, his quiet demeanor, his force of personality would immediately center the attention of the expectant audience. He was not merely a lawyer discussing the case; he was a philosopher discussing life. He would refer to the strange and inexplicable behavior of human beings, moved by unpredictable forces and sudden emotions. He would make only slight reference to the particular facts of the case. He would rather show the factors that had brought the defendant to his present predicament—his heritage, his bringing up, his way of life, the vise closing him in—all those elements that control a man almost without his knowledge. Darrow would talk of man’s inhumanity, the misery of the unfortunate, of the danger of sitting in judgment, of the intolerance of human beings . . .

“Darrow had always been a lawyer for the defense. He would

never prosecute anybody for anything. He would never judge his fellow man."

No better description could be given of the emotive language suitable to a defence lawyer who wishes to distract attention from the issue of the innocence or guilt of his client. *He would make only slight reference to the particular facts of the case.* We note the appeal to those thoughts and emotions, just discussed in these pages, that govern the relations between the individual and society, an appeal which no doubt was all the more successful because Darrow himself felt strongly on one side of the question: *He would never prosecute anybody for anything. He would never judge his fellow man.* All the elements of the emotive style are there: the quiet tone, the dreamy atmosphere, the philosophical discussion of life, the appeal to the wonderful and unintelligible in our experience, the exposition of the determinist theory of human character, and then the demand for pity towards the unfortunate and sympathy towards the misunderstood.

Since religious feelings of one sort or another are common to the greater part of mankind, and since the Bible is the best known of all books, biblical references are frequently found in the speeches of lawyers who wish to distract attention from the facts of the case. Nor need they have much difficulty in finding apposite quotations, for there is scarcely any thesis for whose support it is impossible to find a suitable text. There is danger, however, in going too far, and even unsophisticated juries may not be favorably impressed by overt comparisons between the defendant and Jesus Christ. The Crucifixion, in fact (so strong are feelings on this subject), is a topic that perhaps is best avoided in court. In the Greenville lynching case Mr. Marchant, one of the lawyers for the defence, may have been imprudent when, in comparing the prosecution of his client with the sufferings of Christ, he urged the jury to recall the words, "Forgive them, Father, they know not what they do." Mr. Wofford, another attorney, wondered whether Willie Earle, the dead Negro, had ever read the commandment "Thou shalt not kill," and still another defence lawyer took pains to re-

mind the jury that the Bible is a part of the common law of the State of South Carolina. There were also references to the wisdom of King Solomon and to the Book of Deuteronomy. Apart from other peculiarities, the case included an astonishing range of allusions to irrelevant topics thought to be capable of arousing emotion. The chief of these were suspicion of the federal government, hatred of the South for the North, fear and hatred of the Negro, hatred of foreigners, avarice, family affection, the home, family bereavement, state patriotism, Christianity, alcohol, mediaeval tortures, and political prejudice in favor of the Democratic and against the Republican party. The defence attorneys in this trial undoubtedly made the most of their chances.

There is little difference between the methods used by the attorneys in the trial at Greenville, South Carolina, and those that Mark Antony once used at Rome. For the most part Antony's language is abstract, vague, and general: he appeals to cupidity and patriotism. But when he has made his point, when his audience is convinced that the revolution was attempted for private ends, then he turns to the fact of Caesar's murder and suddenly becomes highly specific, particular, concrete, and exact. Producing Caesar's mantle, he cries:

Look, in this place ran Cassius' dagger through.
See what a rent the envious Casca made.
Through this the well-beloved Brutus stabbed;

Then he displays the body:

Kind souls, what weep you when you but behold
Our Caesar's vesture wounded? Look you here!
Here is himself, marr'd as you see with traitors.

1 PLEBEIAN: O piteous spectacle!

2 PLEBEIAN: O noble Caesar!

3 PLEBEIAN: O woeful day!

4 PLEBEIAN: O traitors, villains!

1 PLEBEIAN: O most bloody sight!

2 PLEBEIAN: We will be reveng'd.

ALL: Revenge! About! Seek! Burn! Fire! Kill! Slay! Let
 not a traitor live!

The next illustration of the two forensic styles comes not from the Forum of ancient Rome but from the Old Bailey in London. The Fahmy case, tried in September 1923, was probably the most sensational of the latter part of Marshall Hall's career. He was defending Madame Fahmy, a young Frenchwoman married to an Egyptian prince, on a charge of murdering her husband by shooting him with a pistol in their suite at the Savoy Hotel. Fahmy was a man who, having inherited great wealth and bought himself a title, lived in luxury and self-indulgence. At the time of the trial Marshall Hall was ready with evidence, obtained abroad, that he had abnormal tastes and habits in whose gratification he expected his wife to take part. Their six months of married life had been miserably unhappy for the woman.

On the night of July 9, 1923, heavy summer rain deluged southern England. The storm that swept down the Thames Valley is still remembered at Eton College, for lightning struck the college chapel and dislodged one of the pinnacles. The storm reached London later in the night, and was still raging at two o'clock in the morning when three shots were heard by a Savoy Hotel porter who was upstairs attending to the baggage of some late arrivals. The sounds came from the Fahmy suite, where Prince Fahmy was lying dead on the floor, having been killed by three shots from an automatic pistol which was found on the carpet near his body. To the night manager Madame Fahmy cried: "What have I done? What will they do to me? Oh, sir, I have been married six months, and I have suffered terribly." To the doctor she said, "I pulled the trigger three times." She was arrested and charged with murder.

The weapon had been given to her by her husband so that she could protect her jewels. It was not a revolver, but a repeating pistol in which the recoil is used to bring a fresh cartridge from the magazine into the breech. Marshall Hall knew a great deal about firearms—the knowledge was often of use to him in his pro-

fession—and he brought expert testimony to prove that once the first shot had been fired it needed only a slight pressure on the trigger to discharge further shots. The accused woman claimed that as her husband advanced on her she fired one shot out of the window in order (as she thought) to empty the pistol, and then pointed it at him simply with the intention of frightening him away and of preventing him, as she said, from “jumping on her.”

There were three women on the jury, and Marshall Hall was able to create immense sympathy for the sufferings that the woman in the dock had been exposed to at the hands of her husband. He made the most of the alleged Oriental habits of the dead man and of his horrid satisfaction in the possession of a Western woman. So picturesque was his handling of this side of the case that the Attorney-General received a cabled protest from the leader of the Egyptian bar. There was medical evidence that Madame Fahmy was in a painful condition needing relief by an operation for which her husband refused to provide the money, and that this condition made her husband's attack specially frightening to her. There was unimpeachable testimony that she had previously been terrified of what he might do. Only a month after her marriage she had left with her lawyer in Egypt a document, to be opened in the event of her death, in which she accused her husband of having sworn on the Koran to avenge himself on her. A letter from Fahmy was produced in which he wrote: “Just now I am engaged in training her. Yesterday, to begin, I did not come in to lunch or dinner, and I also left her at the theatre. This will teach her, I hope, to respect my wishes. With women one must act with energy, and be severe.” But the most extraordinary indication of her fears was given on the last day before the killing. As she sat at lunch with her husband in the Savoy restaurant on July 9, the leader of the orchestra asked her what she would like played. “Thank you very much,” she replied, “my husband is going to kill me in twenty-four hours, and I am not very anxious for music.”

Marshall Hall was thus not without material for his closing ad-

dress to the jury. The prosecution was conducted by Percival Clarke, and in his cross-examination of the prisoner (who went into the box in her own defence) he made as dexterous a use of the word *ambitious* as Mark Antony himself. "Madame," he asked her, "were you not very ambitious to become his wife?" The prisoner's answer helped her with the jury. "Ambitious?" she said. "No. I loved him so very much, and wished to be with him." The end of Percival Clarke's opening speech was a model of factual statement: "Coming to this country, persons are bound by the laws which prevail here. Every homicide is presumed to be murder until the contrary is shown. From her own lips it is known that she it was who caused the death of her husband. And, in the absence of any circumstances to make it some other offence, you must find her guilty of murder."

It was felt by the defence that national prejudice might not work entirely in favor of the prisoner. Efforts to arouse antagonism against Oriental vices and the Oriental view of women were certainly successful—there was much to be said—but the British are fond of contrasting the stolidity of their own judicial procedure with the emotional excesses supposed to occur in French courts in cases of this kind. The late Edward Marjoribanks, Marshall Hall's biographer, was himself engaged in this case as a junior counsel for the defence, and he makes it clear that this contrast was much in people's minds: "The lady forgot she was not in Paris,' many people said. 'There, no doubt, she would have been acquitted—*crime passionnel*, you know—but one cannot behave like that in London.'" Marshall Hall cleverly tried to twist this feeling to his own side in the following passage of his examination of Madame Fahmy:

Why did you assent to come to London, when you were so frightened?

I had to come to London for family reasons. I had always hoped he would change. Every time I threatened to leave him, he cried, and promised to alter. I also wished to see my daughter, who was at school near London.

Did you think you would be *safe* in London? (Here Marshall Hall turned to the jury.)

I passed from despair to hope, and from hope to despair.

In his closing address to the jury, he actually imitated Fahmy's stealthy advance towards his wife before she pulled the trigger. Marjoribanks, who saw it from his seat among the counsel, says that this was the most wonderful physical demonstration of Marshall Hall's career. "In sheer desperation," said Marshall Hall, "as he crouched for the last time, crouched like an animal, like an Oriental, retired for the last time to get a bound forward—she turned the pistol and put it to his face, and to her horror the thing went off." The word *thing*, as suggesting Madame Fahmy's attitude towards firearms, is particularly artful here. It implies both ignorance: "How does this thing work?" and fear: "She dreaded the Thing in the next room." The demonstration was necessary to bring home to the jury the defence theory of the shooting. But in the later part of his speech, Marshall Hall passed from the specific to the general. He wanted to get the benefit of the emotions that the jury had on the subject. This is what he said:

They would recall that when, on one occasion, the accused retaliated upon her husband, he gave her such a thrashing that she never dared to touch him again. Fahmy was a great muscular fellow, and she was a small woman . . . Going to her room, she found a loaded revolver. Something flashed through her mind: here lying to her hand was something likely to protect her against the violence of her husband. He asked the jury to remember the effect of the storm that night on a woman of nervous temperament who had led the life she had done. He recalled that after the shooting Madame Fahmy fell on her knees beside her husband, crying, "Sweetheart, speak to me." Was that deliberate, wilful murder? The onus of proving that it was a deliberate murder was on the prosecution. To use the words of his learned friend's great father [Sir Edward Clarke] many years ago in another case at the Old Bailey: "I don't ask you for a verdict: I demand a verdict at your hands."

This passage is worth careful study. In the first two sentences the speaker refers to an attack by Madame Fahmy on her husband, and an attack by him on her. For the first he uses the word *retaliate*, which is not only abstract but also directs attention to an alleged previous act of the adversary. (In World War II the Germans gave the name *Vergeltungswaffen* (retaliation weapons) to the rockets they sent against London.) But in referring to Fahmy's attack on his wife, Marshall Hall uses the brutally specific and concrete word *thrashing*: Fahmy was *a great, muscular fellow*, and she was *a small woman*. The description of the shooting is in terms of the most extraordinarily vague, general, and abstract character. *Something flashed through her mind . . . something likely to protect her . . . the effect of the storm . . . a woman of nervous temperament . . . led the life she had done*. This is what Percival Clarke, in his address to the jury, said of the same scene:

Was there any doubt that the accused seized the pistol and shot her husband while he was playing with a dog?

Could anything be more specific, more concrete, and more effective?

The jury was out for rather over an hour, and found the prisoner not guilty either of murder or manslaughter; she was immediately discharged.

To be concrete, specific, and particular is to be forceful in all situations, not merely in court, as every good author knows. When Mr. Hays in *City Lawyer* writes: "Suppose all business were subject, not to definite laws but to government supervision! Suppose every businessman had a policeman at his elbow!" he makes his meaning vivid by providing a concrete illustration. Whether his picture does fairly illustrate the situation is open to doubt, but it cannot be denied that the picture helps the argument. Language that is concrete, specific, and particular is always the most effective in bringing a picture vividly before the mind. The picture may be wholly false; it may be a picture of something that never hap-

pened; but there it will be before the mind's eye. The second kind of language—the vague, general, and emotive kind—is used by speakers who are unwilling that their hearers should see any picture clearly, speakers who, like Clarence Darrow, “make only slight reference to the particular facts of the case,” and who distract their attention from these particular facts to the gorgeous but unsubstantial creations of the mind.

Bias

CHAPTER IV

ON AUGUST 6, 1947, Mr. Attlee, the British Prime Minister and leader of the Labour Party, stated in the House of Commons: "The policy of this Government is not based on ideological prejudices; it is based on principles which I believe to be right and sound." Two days later Mr. Dalton, Chancellor of the Exchequer, said in the course of a Commons speech: "None of us must use the present circumstances of scarcity to our own advantage by way of individual earnings or profits, or by forcing upon the country our own pet theories." Since the Opposition believed that the members of the Labour Government were indeed forcing upon the country their own pet theories, this sentence drew audible protest, in reply to which Mr. Dalton added "that did not mean not carrying out our political programme." A week later Winston Churchill, giving his opinion of the Labour Government, said: "Unhappily, these men, called to the august task of setting the country on its feet again, were obsessed by party faction and class prejudice, and they cared far more for pleasing their own extremists than for solving the grim problems of the aftermath which beset us all."

Whatever argumentative force these passages may carry (and perhaps it is not much) derives from the use of colored words (*bias words*) chosen to convey an opinion or judgment rather than information about the facts referred to. Such words tell the hearer more about the speaker than about the subject. The only differ-

ence between *ideological prejudices* and *principles which I believe to be right and sound* is that Mr. Attlee believed in one and not the other. For Mr. Churchill the categories were simply reversed. When Mr. Dalton spoke of *our own pet theories*, the *our* was a mere politeness. He had in mind the pet theories of the opposition, and was naturally shocked and surprised to find that anyone should apply such a phrase to the theories of his own party, which was simply *carrying out our political programme*. The same opinions, that is, which by one party are called *pet theories* and *ideological prejudices*, are by the other party described as *right and sound principles*.

The description of the same thing in different ways is not always done with the object of giving an opinion about it. Journalists who have to write about the same topics every day become proficient in the search for synonyms. Readers of the sporting pages in the newspapers probably know how hard it is to find any fresh way of saying that a touchdown was scored. Here is an example of technical virtuosity from the financial page of a Dublin daily (the *Irish Times* of August 1, 1947), in which the downward movements of a single day were recorded in the following terms:

Quotations registered substantial falls

Dalton 2½ p.c. marked a loss

Old Consols registered a decline

War Loan 3½ p.c. finished one point off

Home Rails weakened somewhat

Foreign Bonds came on offer

Brazilians closed one to four points easier

Further heavy falls were registered in the Industrial group

Iron, Coal, and Steel shares were weak

Tobaccos were again offered

Aircraft shares continued to drop

Newsprint weakened

Purnell and Sons and Bowaters each fell ½

Shipping shares marked losses

B.E.T. Defd. were marked down

Imperial Continental Gas lost two points

Building issues continued to droop

Spillers issues continued weak
 United Dairies experienced another loss
 Forestal Land, H. P. Sauce, Barry and Staines, Borax Defd., Cat-
 alin and Beechams Defd. were all weak spots
 International stocks slipped back
 Joint Stock Banks closed on the weak side, with Lloyd's 3s 6d
 down at 60s 6d
 Oil shares left off flat
 Royal Dutch weakened $\frac{3}{4}$
 Rubbers closed on the weak side
 Gold Mines shared in the downward movement
 The O.F.S. group mostly finished 1/16 to 3/16 off
 The dividend-payers also reacted
 West Africans closed dull
 Rhodesian coppers were reactionary

Lawyers are more likely to be concerned with the use of syno-
 nyms with some purpose in mind. Humorists have often made
 merry over the pretentious use of words borrowed from the French
 to make ordinary things sound remarkable. A *divertissement* is a
 fancy entertainment; a *disease* is a high-class female monologist;
 and *souper* costs far more than supper.

Euphemisms are polite words used in place of the more expres-
 sive ordinary words so that people shall not be shocked. To *pass on*,
pass away, *join the majority*, *cross the Great Divide* are some of
 the many substitutes for *die*. An insurance company in a current
 series of advertisements reassures people about the *discomfort* of
 surgical operations, *discomfort* being a less frightening word than
pain. Men are not supposed to use *scent* or *perfume*, but there is
 less prejudice against their using a *lotion*. All good speakers are
 adepts at putting their thoughts into the words most suitable to
 the circumstances, but lawyers are in special need of bias words
 by which things can be represented in a favorable or unfavorable
 light. If a witness is asked "Did you fail to write that letter?"
 counsel has suggested that he ought to have written it. "Do you
 admit . . . ?" and "Have you confessed . . . ?" are questions
 similarly colored by the use of bias words.

A *divine* is a dignified name for a clergyman, as is well known to lawyers who have to defend the clergy on charges of unbecoming conduct. In politics, the difference between a *politician* and a *statesman* is familiar to everyone: it resides far more in the speaker than in the person spoken of. It is surprising, however, that this should be true of such political terms as *conservative*, *liberal*, and *radical*. An investigation by the American Institute of Public Opinion showed these words to be much less truly descriptive than one would suppose. People were asked to classify the leading political figures of the United States as conservative, liberal, or radical, and showed by their answers that the same man may be a conservative to the minds of some, a liberal to others, and a radical to still others. This is true not merely of a few cautious politicians who may have avoided the expression of any controversial opinions, but of almost every prominent political figure that could be named. It must therefore be admitted that in using these three words people are chiefly describing their own minds. This is the characteristic property of bias words and other value judgments.

Doctrinaire and *theorist* are words applied to a man whose doctrines the writer disapproves of. Users of *doctrinaire* may claim to be criticising the object of their attack for trying to apply his doctrines without enough regard for practical difficulties, but the hostility that the word plainly expresses is almost always caused by the nature of these doctrines: nobody calls a man a *doctrinaire* if he agrees with his opinions. Writers to whose tenets we are hostile may be called *propagandists* or even *agitators*; otherwise they are *publicists*.

It is sad that *political* and *politician* should have acquired unfavorable connotations, but things seem to have improved since Matthew Arnold's American visit of 1888. He said, "I discovered that in truth the practice so common in America of calling a politician a *thief* does not mean so very much more than is meant in England when we have heard Lord Beaconsfield called a *liar* and Mr. Gladstone a *madman*. It means that the speaker disagrees with the politician and dislikes him."

Idealist and *realist* are in their political senses a pair of bias words of special interest. With some writers *idealist* is in common use as a term of disparagement. This is as much as to say that they prefer public men who make no distinction between right and wrong. The word *realist*, most often applied to international politics, is used by the same writers as a term of approval with which almost any infamy can be endorsed. It is perhaps fairer to say that these usages indicate a belief on the part of the writer not that evil is to be preferred to good, but that evil is more real than good—a belief that tells one as much about the writer as about the person or policy described. The same commentators on our political life are opposed to the influence of *professors* on government and would prefer the influence of businessmen. Professors are distinguished by a thorough knowledge of some branch of learning and by practice in the art of communicating it. If his subject (perhaps history or economics) is related to the art of government, it is strange that a professor should not be preferred to a man whose life has been devoted to the service of private profit—a pursuit little adapted to public business. But writers who use the word *professor* as a term of contempt do not really believe that a knowledge of history or economics is a handicap to an administrator. Their dislike of professors in the government is caused by a suspicion that the attitudes of the professors are less selfish than their own, whereas they feel that businessmen can be trusted to look after the interests of other businessmen.

Bias words, then, form a special type of projective word. Projective words are those such as *beautiful* or *interesting* that are used to project the feelings of the user on to the object described. When a man calls something *beautiful*, he is describing the way in which it affects him. The illusion that he is saying something about the object (instead of something about the relation of the object to himself) has from time to time caused considerable trouble in aesthetics, and books have been written about “the beautiful” without any hint that there may not be any element common to all beautiful things. When President Truman an-

nounced that he did not like modern art—*ham-and-egg* art is what he called it—he was telling the public something about himself, not something about art.

Many people have heard of the experiments on observation that Professor Münsterberg used to carry out with the students in his psychology course at Harvard. The main object of these experiments was to find out how accurately witnesses can be expected to testify on what they see and hear. The experiments established, as others of a similar kind have done, the unreliable character, even in essentials, of the testimony of honest people. But they also proved that people often see what they expect to see, by projecting their own thoughts on to the object of observation. Münsterberg, for instance, would exhibit a word on a screen for a very short time, a mere fraction of a second, and would then find out how many of the spectators had been able to read it. Many read the word wrong, and of these most saw, or thought they saw, what they had been led to expect. In one such experiment the professor discussed college life and then flashed the word *courage* on the screen; it was seen as *college*.

It is true that in reading of Professor Münsterberg's experiments one feels a slight suspicion that the attitude of all his youthful audience may not have been entirely serious, and that some of them may have been influenced by the satisfaction with which the learned man received confirmation of his theories on the unreliability of testimony. It is natural to wish to astonish someone who asks questions, though this human tendency is not always understood by those who conduct polls and questionnaires. The student of language, like a lawyer handling a witness, needs always to remember that the words with which a man describes something are a description of himself as well as (or sometimes instead of) a description of the thing.

To return to bias words of the simplest type. In his book *Peace or Anarchy*, Cord Meyer, Jr., points out that foreign agents are always called *spies*, whereas agents of one's own country are *intelligence officers*. During World War II and afterwards the irregu-

lar forces fighting on our side were called *partisans*, the *resistance*, the *underground*; those against us were called *rebels*, *terrorists*, or *gangsters*. At the time of the disturbances in Palestine, the irregular Jewish and Arab forces were described by either set of terms according to the sympathies of the writer. The New York newspapers of September 9, 1947, had some instructive examples of biassed writing in their accounts of the landing in Germany of some would-be immigrants into Palestine who had been taken to Germany by the British and forcibly disembarked when they got there. The *Daily News* had a headline

BRITISH TROOPS CLUB JEWS OFF REFUGEE SHIP

and carried an Associated Press report which read in part:

British troops disembarked 1406 Jews of the Exodus 1947 today amid scenes of violence, using clubs and fists to smash resistance of some against landing in Germany . . . the British troops began beating the resistant Jews with clubs and dragging them bodily down the dock.

The *Daily Mirror* headline was

BRITISH TROOPS WITH CLUBS DRIVE REFUGEES FROM SHIPS

and the paper carried the same A.P. report except that the word *billy-clubs* was used instead of *clubs*. The *Herald Tribune* put less emphasis on the violence of the methods used by the British. The headline was

1406 EXODUS JEWS LANDED, SOME CLUBBED

and the report stated

British troops wielding wooden clubs forcibly disembarked today from the transport Ocean Vigour a number of struggling, kicking Exodus 1947 Jewish refugees . . . Fists and clubs were the only weapons used.

In the three headlines there is a progression from "Troops Club Jews" through "Troops with Clubs Drive Refugees" to "Jews Landed, Some Clubbed." The A.P. report emphasises the brutality of the occurrence by such words as *scenes of violence . . . smash resistance . . . began beating the resistant Jews with clubs* (the word *began* is important here) . . . *dragging them bodily* (the word *bodily* is an emotive intensifier; there is no other way of dragging anybody). In the *Herald Tribune* some share of the violence is attributed to the *struggling, kicking Jews*, and the use of fists and clubs by the British is mitigated by the words *were the only weapons used*. The *New York Times* headline was still more moderate. It said

TOKEN FIGHT WAGED AS JEWS OF EXODUS BEGIN DEBARKATION

and in the secondary headline

CLUBS SPANK RESISTERS

there was a pleasing suggestion that the whole fracas was just a nursery squabble. This suggestion was continued in the report, which said

Wooden truncheons were brought into spanking play against the buttocks and shoulders of those who tried to break through the line.

The Summary of News in this paper said "British military police use truncheons to spank recalcitrants into line." But to find the incident described wholly from the other side it is necessary to go to London, where the headline in the *Daily Telegraph* read

JEWS USE BOTTLES AND CLUBS ON TROOPS

A member of revolutionary forces may be a *hero* to one side and a *traitor* to another. In the first World War, Sir Roger Case-

ment was a *traitor* to the British and a *hero* to the Irish. We remember that

Treason doth never prosper: what's the reason?
Why, if it prosper, none dare call it treason!

Our own or allied forces *withdraw* or *retire*; the enemy *retreats* or *flies*. Goods acquired by armies may be *requisitioned*, *commandeered*, *seized*, *confiscated*, *grabbed*, or *liberated*. The last word obtained an unfortunate meaning during the invasion of Europe by the Allies in World War II, and a weekly American magazine published over the caption *Russian Liberates Bicycle* a photograph of a Russian soldier snatching a bicycle from a woman in the streets of Vienna. Public disorders may be described as a *riot* (a neutral word), but if people are killed the riot may become a *massacre* or even a *holocaust*.

Privilege and *right* are a well-known pair of bias words that often appear in the courts: it is usual to refer to one's own rights and other people's privileges. In 1917 the Postmaster General, exercising the power conferred on him by the Espionage Act of the same year, made an order prohibiting the *Milwaukee Leader* from the second-class mails. The Supreme Court, 255 U.S. 407, 436 (1921), upheld the order, but Justice Brandeis, in a dissenting opinion, said that access to the second-class mail was not a *privilege* but a *right*.

Maimed is a word meaning *permanently injured* that is useful in actions for damages for bodily injury. Marshall Hall, for instance, once spoke of "a poor woman maimed in a street accident who will spend the rest of her days in the workhouse if she loses her case." *Mutilated* is stronger still, partly because it is sometimes employed as a euphemism for *castrated*. People may be *well-known*, *celebrated*, or *famous*; or they may be *notorious*. Substitute materials may be described as *replacement*. The word was used as an adjective during World War II, when something described as *Replacement Linseed Oil* was offered for sale: it was not linseed

oil. Or they may be called *false*, *imitation*, *sham*, or *bogus*. A room with a *draft* becomes desirable when the landlord points out that it has *cross-ventilation*. *Raw rum* is just as *pure* (i.e., free from admixture) as *pure* milk. People may be *polite* or *courteous* (these are favorable words), or they may be *obsequious*, *subservient*, or *servile*. They may be *affectionate* and *loving*, or they may be *amorous* (as in *amorous advances*). *Stagnant* is an unfavorable word for *unchanged* ("Have your opinions on this subject remained stagnant for five years?"). *Collusion* is an unfavorable word for *cooperation*. Information may *transpire* (a neutral word), or *leak out* (an unfavorable word, perhaps from the association with sinking ships). Statements may be *affirmed* (with the implication that they are true); *asserted* (a neutral word); or *alleged* (with the suggestion that they may be false). There is a whole group of words with which it is possible to give an unfavorable opinion of enviable qualities: such are *plausible*, *flashy*, *specious*, *meretricious*, *glib*, and *facile*. *Clever* and even *brilliant* carry in certain contexts a shade of disapproval. Names for subordinates include *official*, *associate*, *deputy*, *assistant*, *lieutenant*, *employee*, *hired man*, *the help*, and *servant*. *Myrmidon* is now mainly comic, as in *myrmidon of the law* for *policeman*, whereas *henchman* and *hireling* are strongly unfavorable. In the Fahmy case Marshall Hall described as *Negro hirelings* the servants who were employed by Prince Fahmy to terrorise his wife. The word *brainstorm*, supposed to have been invented by Delphin Delmas, Thaw's lawyer, to denote a sudden attack of irresponsibility, has been exceedingly useful to defence lawyers in criminal cases. A lawyer may ask for *substantial* damages (big, and so they ought to be), or he may say that the other side is trying to *inflame* the damages (increase them wrongfully). A judge's opinions may be *magisterial* (good), or *schoolmasterish* (bad). If they are full of references to other cases they may be called *learned* and *well-documented*, or they may be dismissed as *derivative*—a term that demands an originality in the interpretation of the law which it is perhaps scarcely reasonable to expect.

Bias words are an inseparable element of persuasive speaking, and can be objected to only when they are supposed by the user to have the force of arguments. The use of a bias word naturally tells one nothing of the merits of the feeling that is expressed by it. An alchemist who had given up the search for the philosopher's stone would no doubt have been scorned as a *defeatist* by his colleagues, but none the less his decision would have been wise. Occasionally words in good scientific standing pass into the popular language as bias words with a new meaning. This has happened to the word *degenerate*, which because of its use as a violently unfavorable bias word in popular speech is now disappearing from biology. On the whole, however, the use of bias words is a respectable linguistic device, and it will be instructive to take a number of examples of such use from the opinions of Justice Holmes.

The first quotations come from the opinion that Holmes wrote for the Supreme Court in the Debs case, 249 U.S. 211 (1919). Eugene Debs was a Socialist and pacifist who vehemently opposed the first World War. As a result of a speech in Canton, Ohio, in which he expressed these views, he was charged under the Espionage Act with incitement to mutiny and with obstructing recruiting. In his address to the jury Debs said: "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose war if I stood alone." He was sentenced to ten years in prison.

The opinion in which Holmes, for the Supreme Court, confirmed the conviction, comments on an antiwar proclamation of which Debs is supposed to have approved. Holmes says of it: "This document contained the usual suggestion that capitalism was the cause of the war . . ." The word *usual* deserves attention. It carries the implication that because the suggestion is usual it does not need an answer, having presumably been often answered already. It thus enables the speaker to have it both ways; for if an opinion is familiar he can dismiss it as *usual*, and if it is not, it can be discarded as *eccentric*. In a previous passage Holmes, in writing

about Debs' speech, mentions "the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens . . ." Here *usual* has the same effect as above, but *sneer*, an unfavorable word for an unfavorable reference, belongs perhaps to a rather lower level of discourse than Holmes was accustomed to.

Somewhat similar to *usual* as a bias word are *often repeated* and *rudimentary* in the Holmes dissent from the judgment of the Supreme Court in the Olmstead case, 277 U.S. 438, 469 (1928). Olmstead had been convicted of offences against Prohibition laws with the help of evidence obtained by listening to his conversations on the telephone. He claimed that the behavior of the federal agents violated the guarantee against searches in the Fourth Amendment and against self-incrimination in the Fifth Amendment. The Supreme Court by a majority of five to four upheld his conviction. In his dissent Holmes wrote:

I am aware of the often repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks v. United States*, 232 U.S. 383 and the cases that have followed it.

Often repeated implies that the statement is wrong, since if it were acceptable it would not need such frequent repetition. *Rudimentary* is more interesting. It resembles *primitive*, and like that word can be favorable or unfavorable. A *rudimentary* statement of law can be either correct because it is so simple that doubt is impossible, or, as here, wrong because the people who make it are (unlike the speaker) not subtle enough to understand the intricacies of the subject.

Holmes resembled almost everyone else in using such words as *sound*, *enlightened*, and *intelligent* in contexts where they denoted merely that the people who had such views agreed with him. In

his dissent in *Vegelahn v. Guntner*, 167 Mass. 92, 104 (1896), we read:

I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organised refusals to work. I suppose that intelligent economists and legislators have given up that notion today.

A rather more elaborate manner of indicating disapproval is to be found in his dissenting opinion in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930). He referred to a number of precedents which had not been followed by his brethren in the majority (and which he thought should have been followed) in these terms:

I suppose that these cases and many others now join *Blackstone v. Miller*, 188 U.S. 189, on the *Index Expurgatorius*.

To conclude these examples of bias words from the opinions of the great jurist, here is an early opinion, Holmes, J., for the Court in *Noble State Bank v. Haskell*, 219 U.S. 104 and 575 (1911), in which the bias words have been marked by italics:

In answering that question we must be *cautious* about *pressing* the *broad* words of the Fourteenth Amendment to a *drily logical extreme*. Many laws which it would be vain to ask the Court to overthrow could be shown, easily enough, to transgress a *scholastic* interpretation of one or another of the *great* guaranties in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few *scientifically certain* criteria of legislation, . . .

In another method of indicating bias the general is substituted for the particular. There are words that refer both to general behavior and also to particular examples of such behavior. *Liar* is such a word. It means both a man who habitually tells lies, and a man who tells a particular lie. This is the explanation of the old paradox "David said all men were liars. David was a man; there-

fore David was a liar. Therefore David lied when he said that all men were liars. Therefore all men are not liars," etc. In its crudest form, this simple trick would hardly do for a jury, who would scarcely believe that because a man has stolen once (and is therefore a *thief*) he must steal always. But it is common, and natural, for counsel to generalise in this way without much more foundation. Such an unwarranted extension of particular terms to general situations underlies a question frequently asked of defendants who are on trial for killing someone who has committed a terrible injury against them; perhaps by embezzling their fortunes or seducing their wives. "Do you believe," they are asked, "that a person who behaved as X behaved deserves to be killed?" or, "Do you think a husband is justified in killing a man who has seduced his wife?" An affirmative answer is likely to endanger any line of defence that may have been set up; a negative answer leads to the question "Then why did you kill X?" The defendant, if well advised, will confine his opinions to cases, such as his own, in which the circumstances are precisely defined.

A method of indicating bias somewhat more elaborate, and often more effective, than the use of bias words is afforded by metaphor. To this the next chapter is accordingly devoted.

Metaphor

CHAPTER V

IN THE same House of Commons debate from which in the last chapter were quoted some utterances of Mr. Attlee, Mr. Dalton, and Mr. Churchill, there was a metaphorical passage by Sir Stafford Cripps that will do very well to begin a discussion of this topic.

Production and production alone could find us relief in our immediate situation. It was no part of British character to resign ourselves to such difficulties or to fail to take measures, however hard, to overcome them.

It had been truly said that by our faith we could move mountains. It was by our faith in ourselves, in our country and in the free democratic traditions for which the people of this country had for centuries fought and battled and for which they must fight again as willingly on the economic front as upon the ocean, on the land and in the air—it was by our belief in the deep spiritual values that we acknowledged in our Christian faith—that we should be enabled and inspired to move the present mountains of our difficulties and so march into that new and spiritual plain of prosperity, which we should travel in happiness only as the result of our own efforts and our own vision.

What may at first seem remarkable about this piece, which formed the peroration of Sir Stafford's speech, is that it was immensely successful. The speech as a whole was described in the next day's newspapers as the best he had ever made in Parliament, and when he concluded he was received with "loud and prolonged

cheers." The peroration "stilled the House," which was restive after a long tedious speech by Mr. Dalton that had been much interrupted.

Before Sir Stafford entered politics he was one of the most successful lawyers at the English bar, so it should be possible to learn something from this choice specimen of his art. Its excellence certainly cannot be due to any information that it conveys. Its effect is emotive, and its hearers liked it because it produced certain feelings in them. The debate had been a discouraging account of the economic difficulties of the country, the more discouraging because no one had been able to propose any measures that seemed at all likely to achieve success. At the end of the day Stafford Cripps offered his hearers emotional satisfaction in the form of self-confidence and hope, presented under the name of *faith* by which religion is able to make these desirable feelings seem justified by divine sanction. The quoted passage is full of familiar symbols that come ready-tagged with emotions—*stock responses* is the technical term—which are all the more welcome to a weary audience because little effort on their part is required to recognise the kind of feeling that they are expected to have. When a speaker in the House of Commons talks about *British character*, his hearers know that they are supposed to think well of it. *Faith* stands for self-confidence, hope, and religion. *Mountains* are symbols of grandeur, solidity, calm, and aspiration, and remind the harassed of the old verse in the Psalms: "I will lift up mine eyes unto the hills, from whence cometh my help." *Free democratic traditions* have not much to do with the country's economic difficulties, but are included because of their emotional effectiveness. *Fought and battled* suggests that economic troubles can be overcome by effort and do not have to be passively endured. The economic *front* is likewise intended to emphasise an analogy with war. *Upon the ocean, on the land and in the air* conveys no information, but gives a spacious feeling very welcome to men who fear that England is shut in and stewing in her own troubles. *Our Christian faith* appeals both to a feeling of group solidarity and to the powerful

emotions evoked by religion, while even a Jew or a Mohammedan is interested in *deep spiritual values*. Moreover, anyone who is in financial or economic difficulty would like to think that what he needs to solve his troubles is more faith (and not more money or better markets). The figure in which man *marches* on to something better is very ancient but not (at this level) less effective, and the *plain* to be reached is not merely *prosperous* but *spiritual* too, a desirable combination that must satisfy every need. The speech closes with *happiness, efforts, and vision*, whose emotive powers are reinforced by the reiterated *our own*. No wonder Sir Stafford got his ovation!

It must be admitted that though this is effective speaking, it is effective at a low level. What went well enough in debate at the end of a long day will not stand analysis on the following morning. The two principal metaphors combined in the passage go uneasily together. When Christ told His disciples that by their faith they could move mountains, He did not add that they could then march forward into a plain. *That new and spiritual plain of prosperity* disappears when a survey is attempted. A plain may be associated with prosperity because it is free from geographical obstacles, but this plain has been produced by moving a mountain; nor is it clear why it should be called *spiritual*. And a Christian is likely to remember that the faith which will move mountains is most emphatically not *faith in ourselves, in our country and in free democratic traditions*. But he may not remember it while the speech is going on, and the redundancy that irritates us as we read (*fought and battled*) may to a listener sound merely like legitimate emphasis.

From this example it should be clear enough that one important use of metaphor is to create mood. It can also be used to convey information, usually in the way of explanation. Writers on popular astronomy who begin their expositions by comparing the earth to an orange are using metaphor for this purpose. But in the courts the emotive function predominates. Confusion between the two

functions is the foundation of a story that was told in London when a notorious swindler was at last convicted at the Old Bailey. He had often been in trouble with the law, but he was a most persuasive speaker, and his addresses to the jury in his own defence had been too effective for the prosecution. On this occasion he was accused of converting to his own use very large sums of money that had been entrusted to him by the public for investment. This time he was defended by counsel, who in his closing speech pointed to the sheathed sword that hangs, as a symbol of justice, on the wall above the bench at the Central Criminal Court. "If you convict my client," he cried, "the sword of justice will leap from its scabbard!" Mistaking this metaphorical observation for an assertion of fact, and eager to see whether the miracle would take place as promised, the jury duly returned a verdict of guilty.

In a discussion of metaphor it is convenient to use the technical words *vehicle* and *tenor* introduced by I. A. Richards. The *vehicle* of a metaphor is the situation chosen to illustrate or express the idea; the idea itself is the *tenor*. The vehicle is what is said; the tenor is what is meant. In the metaphor just described, the vehicle is the sword of justice leaping from its sheath, the tenor is the injury to justice that follows the conviction of an innocent man. A remote connection between vehicle and tenor is by no means a disadvantage. On the contrary, part of the pleasure that we receive from a good metaphor comes from our success in tracing the resemblances between them, just as an educated adult is likely to find the sometimes esoteric cartoons in the *New Yorker* more interesting than the *wham* and *zing* illustrations in the "funnies." In some of the most suggestive metaphors of literature the connection between vehicle and tenor is so remote as to be almost baffling. Three may be taken from *Macbeth*. On the night of Duncan's murder one character reminds another that the dawn is late in these words:

And yet dark night strangles the travelling lamp.

It is true that a lamp cannot be strangled, and that even if it could *night* seems not to be the right agent for the feat. One critic described this as "probably the most extravagant metaphor in literature" (a rash opinion). But the line has been much admired, and its merit lies in the associations, so pertinent at this point in the play, of darkness, murder, and the extinction of a feeble glimmer (the *travelling lamp*, or sun, suggests man and his journey) by overwhelming powers of ignorance and evil.

When Lady Macbeth is getting ready for the murder of Duncan and working herself into the right frame of mind she cries:

Come, thick night,
And pall thee in the dunnest smoke of hell,
That my keen knife see not the wound it makes,
Nor heaven peep through the blanket of the dark
To cry, "Hold, hold!"

The extravagance of this metaphor, or series of metaphors, must again be admitted, and Dr. Johnson wrote that he could not contain his risibility at it, but a change of taste has undoubtedly taken place in this matter since the eighteenth century, and there are few readers of *Macbeth* who have not found the lines moving. Finally there is Macbeth's magnificent description of the appearance of the slaughtered king,

His silver skin lac'd with his golden blood,

of which Johnson wrote "No amendment can be made to this line, of which every word is equally faulty, save by a general blot." Modern critical opinion does not agree with Johnson.

A story is told of Ada, Countess of Lovelace, the legitimate daughter of Byron, who on being shown the ocean for the first time as a little girl, exclaimed, "I don't like it. It's so like my governess." The child must have inherited some of her father's literary gifts. The connections between vehicle and tenor may not be

immediately obvious, but little Ada could scarcely have explained more vividly that she thought of her governess as cold, grey, rough, bitter, monotonous, angry, and potentially dangerous.

Though metaphorical language is predominantly emotive, it may be general or particular, vague or specific, abstract or concrete. In spite of the difficulties of generalising on such a topic, it is probably safe to say that the more concrete, specific, and particular the vehicle the more effective the metaphor. Even the Cripps metaphor (which, as has been hinted, is not the most rational specimen of its type) is concrete in its reference to mountain and plain. The vehicles of the three *Macbeth* metaphors are concrete and specific throughout. Many examples of effective metaphors used in court will be presented—a few in this chapter and others later—and it will be found that in all the best ones concrete and specific vehicles are used. By a suitable choice of vehicle it is possible to indicate approval or disgust. Sun, stars, mountains, rocks, and rivers are favorable vehicles, whereas nobody can suppose that a lawyer wishes to flatter if he compares a man with a snake or his ideas with a sewer. And if *God's time* is spoken of (in contrast with Daylight Saving Time), hearers are left in no doubt of the speaker's feelings on the subject.

Should the vehicle be new or should it be familiar? This is a more difficult question to answer. Though new vehicles have all the advantage of freshness and interest, old ones bring with them emotional associations that may be valuable. Large-scale natural phenomena have always been popular vehicles, and future generations of lawyers will no doubt continue to speak of the night, the twilight, the dawn, the stars, the sea, the ocean, the tide, the wind, the earthquake, the storm, and the rest. But if the vehicle is so familiar that everyone can see it coming from a long way off, then it may fail to carry the feeling intended for it. Who at the moving pictures has not noted with repugnance the candle ready burning by the deathbed? In the choice of vehicle, as in other matters, it is accordingly wise to suit the matter to the level of apprehension

of the audience. Some illustrations of this and other features of metaphor in the courtroom may now be given.

A rather primitive example is to be found in the report of the Greenville lynching trial. One of the defence lawyers spoke in the following terms of the dead Negro for whose murder his client was on trial: "Willie Earle is dead and I wish more like him were dead. . . . You might shoot a mad dog and be prosecuted, but if a mad dog were loose in my community I'd shoot the dog and let them prosecute me." The speaker undoubtedly knew his audience, and this remarkable metaphor must probably be written down as an example of the successful adjustment of tone and material to circumstances.

A less recent but still excellent example of the force that a good lawyer can attain by the use of the specific and concrete vehicles in metaphor comes from a speech that Joseph Choate made against Tammany at a public meeting at the Cooper Institute in New York on November 3, 1871. It is quoted from the *Life* by E. S. Martin.

It is true that we still wear the shackles, and our necks still show a fearful galling from the collars they have borne so long. But we no longer wear our fetters meekly, and are prepared for the struggle, however desperate, that shall cast them off. We no longer kiss the rod of our oppressors, but now have snatched it from their grasp, and mean henceforward to give blow for blow. We no longer lie still with the bedclothes over our heads, pretending to be asleep, while these burglars are rifling our pockets and our safes, but have raised the hue and cry, and joined in full pursuit, and mean not to let go the chase until we have hunted the scoundrels down.

It would be difficult to be more specific than this. And here are two short but brilliant metaphors invented by Justice Holmes. They are taken from *Holmes-Pollock Letters* (ed. M. D. Howe) and quoted by Lerner (*op. cit.*):

I am hard at work . . . preparing small diamonds for people of limited intellectual means.

Of the mind of one of his colleagues he wrote:

He had a powerful vise, the jaws of which couldn't be got nearer than two inches to each other.

A more elaborate effort is the following passage from one of his Supreme Court decisions, *Missouri v. Holland*, 252 U.S. 416 (1920):

When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

The force of this passage comes from the allusions to simple physiological processes, that furnish, at different levels of discourse, the most vigorous swearwords, obscenities, and metaphors. *Beget*, *sweat*, and *blood* are the most important words in this metaphor (we recall Churchill's much later *blood, sweat, and tears*), which is not a mere decoration added to the passage, but animates the whole through the words "called into life a being the development of which . . . its begetters . . . created an organism . . . sweat and blood . . . created a nation."

Scientific metaphors should be avoided by all except the well informed. Speakers without a detailed knowledge of modern science are almost certain to use such metaphors wrongly if they attempt them, and thus run the risk of exposing themselves to the silent censure of judge or jury. To be detected in a mistake, even though it be wholly irrelevant to the issue, is always unfortunate because it leads to a suspicion of inaccuracy in other and more vital matters. It is prudent therefore to eschew *the acid test* and to keep away from *magnets* in all their manifestations. Here is a horrible example from Wellman's *Day in Court*:

. . . to play the part of a great advocate, with "hands charged with electricity and face all ablaze with magnetism" on behalf of his quivering client.

And here is a chemical metaphor that could have been devised only by a writer totally ignorant of chemistry. It comes from Edmund Wilson's *Europe Without Baedeker*:

I have gotten the impression that the average educated Englishman is still thinking of the future of the world in terms of old-fashioned balance-of-power, for which nations are irreducible units that can associate in pacts and alliances like the combinations of molecules in chemistry but cannot cohere to produce a new structure by a process of crystallization.

The same writer uses another queer scientific metaphor in a book review that appeared in the *New Yorker* of October 23, 1948:

. . . in aiming at prisms of prose which will concentrate the infrared as well as the ultraviolet, he leaves these rays sometimes invisible, and only tosses into our hands some rather clumsy and badly cut polygons.

Prisms do not concentrate rays; they do just the opposite. And the antithesis between a neat *prism* and a clumsy *polygon* is a false one; the relation between a *prism* and a *polygon* is similar to that between a cube and a square. There is another strange mistake in D. B. W. Lewis's *Time and Western Man*:

Water freezes just the same, and the "matter" involved remains of constant volume, whether you call it water and frozen-water, or whether . . .

A motorist whose radiator has frozen in the garage could put Mr. Lewis right on this point. The only safe rule is to keep away from these seductive images. A *catalyst* is a dangerous thing to anyone except a chemist; before using the word *osmosis* in a metaphor it is best to find out what it means; and *wave*, *vibration*, and *polarise* are good words to avoid. It will be necessary to say more about the mathematical and scientific aspects of language in the next chapter.

Evaluation

CHAPTER VI

WHEN AN ATTEMPT is made to evaluate something, it is placed on a scale, real or imaginary, that runs from bad to good, from slow to fast, from light to heavy, or the like. "The car was going fast"; "the horse was sold at a high price"; "the picture was very beautiful"; "the orchestra gave an exquisite rendering"—all these are evaluations that in the terms of semantics are called *value judgments*. This is the name given to evaluations that cannot be confirmed by independent measurement. "The car was moving at forty miles an hour" or "the horse was sold for five thousand dollars"—these also are evaluations, but since they could be confirmed from outside sources they are not value judgments. It was explained in the chapter on the two forensic styles that evaluations made in the form of quantitative statements are marks of the factual style, and that the emotive style is marked by the inclusion of the unverifiable evaluations that it is here agreed to call value judgments.

A close reader may already have noticed that though all the examples of value judgments are unverifiable, the reasons for the impossibility of checking them are not all of the same kind. "The car was going fast" is an unverifiable statement not because of any difficulty in measuring the speed of cars, but because *fast* is a bias word—i.e., a word that gives information about the speaker as well as about the thing described. "The horse was sold at a high price" is unverifiable for a similar reason: that unless it is known what the speaker considers an ordinary price for a horse it is im-

possible to know whether the actual price was high or not. In the other two examples the difficulty is of another sort. "The picture was very beautiful" is unverifiable because beauty cannot be measured. Though each observer may have in his mind a scale running from the not-beautiful to the beautiful, the place given to a particular picture on this scale is different for each observer, nor is there any method of obtaining agreement between the different estimates. The same difficulty plainly prevents any verification of statements about the rendering of a piece of music by an orchestra.

It must not be thought that value judgments are meaningless—far from it. Personal opinions may be full of significance and from many points of view of much interest. What is important is to avoid confusing them with verifiable statements, and to be aware of the wide range of opinion that may exist on certain subjects, which may make individual judgments of slight significance except as guides to the mind of the individual. It is true that the inclusion of a verifiable standard of comparison may go far to remove the uncertainty inherent in value judgments. "He is a rich man" gives us little verifiable information. "He is a rich man for this community" is more informative, and "He is a richer man than I am," if the circumstances are understood, may not be a value judgment at all.

It is likewise desirable to maintain a rather strict distinction between things that can be measured and those that cannot. It may be thought that too much is being made of a difference that is obvious without explanation. But the difference between things that can be placed on a numerical scale and things that cannot is one that escapes many minds. Ruskin once described the view from Friar's Crag, in the English Lake District, as "the fifth most beautiful water-level view in Europe." Except as a statement that he enjoyed that particular view, and was familiar with many other views in Europe that he liked too, this evaluation is nearly meaningless. Matthew Arnold, in one of his most admired books (*Culture and Anarchy*), wrote: "Religion deals in conduct; in three-fourths, therefore, at the very lowest computation, of human life."

Now human life cannot be divided into fractions, as though it were a Dutch cheese. A man cannot say, "Three quarters of my life is conduct and one quarter something else." But perhaps Arnold merely wanted an emphatic way of stating a belief that conduct was by far the most important part of life? Possibly, but if so he should not have continued as he did: "The only doubt is whether we ought not to make the range of conduct wider still, to say it is four-fifths of human life, or five-sixths . . ." Emerson erred in the same way when in "Compensation" he wrote "All love is mathematically just, as much as the two sides of an algebraic equation." This is simply not true. The two sides of an equation balance if they conform with certain mathematical rules, and not otherwise. The decision is not a value judgment, but can be made by any competent mathematician with the certainty that he is right. With the other half of the proposition such clear decisions cannot be made. Whether two specimens of love are equal or not is a question that can be answered only in a figurative sense, and must then remain entirely a matter of opinion.

As a final example of confusion, a recent advertisement for an office appliance has the following sentence: "*Only one man in twenty-five, one woman in four*, has better than average finger dexterity . . . and average isn't very good!" Now since finger dexterity can be measured (under certain conditions), it is not unreasonable to say that a given person's finger dexterity is better or worse than the average. How only four per cent of the men can have better than average dexterity is something of a puzzle, though a solution is not absolutely inconceivable, since in every hundred men there might be ninety-six with dexterity a little below the average and four very gifted ones with ability far above it. But what can be meant by the statement that "average isn't very good"? Good compared with what? Surely not with performing chimpanzees or concert pianists; yet in the absence of any indication of the sort the figures lose whatever meaning they might otherwise have—which indeed is not much.

Anyone who thinks this to be an extreme example of misunderstanding about numbers and what they can do should look into the voluminous * educational literature of our time. It reveals a truly astonishing ignorance of the nature of measurement, manifested by simple-minded claims to a precision regulated mainly by the appearance of the figures on the page, and happily applied to anything that interests the writer, whether it be the intelligence of a child, the number of sexual experiences he is likely to have on his way through school and college, or merely his disposition to tell the truth.

All this is very much the concern of the law, which is constantly called on to make value judgments of its own. What is *reasonable* speed or *fair* compensation? Here the only guide is the estimated opinion of reasonable men. On this topic Sir Frederick Pollock once quoted an opinion of Lord Bramwell's about pigs which, he said, was almost a caricature of the general idea of the "reasonable man." The question before the court dealt with a fence alleged not to be strong enough to keep out certain pigs who had done damage, and the passage runs:

Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it.†

For a rebuttal of the idea, thus humorously suggested, that the law errs in trying to draw lines where none exist, Holmes may be quoted in his dissent in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928):

* Voluminous because much of it is paid for by semipublic foundations that print it whether anyone wants to read it or not.

† Quoted in Justice B. N. Cardozo's *Law and Literature*.

When a legal decision is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the point or line seems arbitrary. It might as well or might nearly as well be a little more to the one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Much time in examinations and cross-examinations is taken up by questions of the type of "How many hairs make a beard?" or by efforts to persuade witnesses to make value judgments of the kind desired: to have them say, for example, that a wound was *deep* or *not deep*, that a person had a *good* character or a *bad* one, or that a crowd was *large* or *small*. If the evaluation required is of something that can be measured, perhaps the speed of an automobile, then the usual method of handling a witness in this situation is to try to pin him down to a numerical estimate. The witness, however, who may be supposed an honest man and a capable observer testifying in the interests of truth, is justified in any disinclination to swear to a speed anywhere between fixed limits, e.g., between fifty and seventy miles an hour. The difference between swearing to an estimate and swearing to a fact is not a subtle one, and is at the root of the situation, for whereas an honest man may swear that his estimate of the speed was between fifty and seventy miles an hour, no honest man who understands anything about observational errors should allow himself to swear that the speed actually did lie within those limits. The point is not merely that speeds are hard to estimate: it is that all estimates made in the absence of measuring instruments are not estimates of fact but statements of probability. Since this is by no means generally understood, and since probability is imagined by most of those who have considered the matter at all to be enveloped in a thick cloud of mystery, a simple illustration may be given.

Suppose an automobile traveling at a uniform speed of fifty miles an hour to pass before a large crowd of competent observers, each of whom is then asked to record his estimate of its speed. These estimates will vary from perhaps thirty to perhaps eighty miles an hour. Very low or very high estimates will be infrequent, whereas estimates in the forty to sixty region will be numerous. Someone who had not been present at the scene and who wished to find out the speed of the car could get a good estimate of it, if he were able to ask all the observers, by taking either the average or the median estimates (the median is the estimate such that the number of others exceeding it is equal to the number falling short of it). But suppose he were able to ask only one observer, who had to be chosen at random! This is the common situation of the lawyer with his witness. He may get an observer who made a good guess, or he may get one who was extremely unsuccessful. All that the witness can swear to is that his estimate is honest. If his estimate was forty miles an hour, and he is asked to swear that the speed was between thirty and fifty, he is being asked to swear to something of which it is impossible for him to be certain. A truthful statement would be: "I estimate the speed at forty miles an hour. The probability that it lay in the 39-41 region is, in my opinion, greater than the probability that it lay in the 38-39 and 41-42 region, which in turn is greater than the probability that it lay in the 37-38 and 42-43 region, and so on." Though the witness may presumably be sure that the car was not traveling at less than zero miles an hour, he should not express certainty that its speed lay below any very high given figure, say a hundred or even a thousand miles an hour, but merely a high probability that it did so.

It is not always understood by the inexperienced that the decimal system of writing numbers allows the mere statement of a number to include a claim as to its degree of precision. For many years the height of Mt. Everest was given on the maps as 29,002 feet because a figure of 29,000 feet would have indicated that the height had been measured only to the nearest thousand feet. If two policemen with synchronised stop watches at the ends of a measured mile

testify that the speed of a motorist was 62.07 miles an hour, it may reasonably be stated that the last digit is false (or rather meaningless) unless the mile was measured with an error of less than ten inches *and* (not *or*) the watches were synchronised to within a hundredth of a second *and* (not *or*) each officer recorded the time with a personal error of less than one two-hundredth of a second (which is impossible).

All these things are well understood by lawyers who are accustomed to deal with such testimony, but requests for an impossible (and delusive) precision are common in such questions as "How low a voltage may be fatal?" or "What is the minimum fatal dose of arsenic?" To these enquiries no exact answer can be given, merely a statement of probability: "Twenty volts is fatal in less than ten per cent of the cases," or "Two grains of arsenic will kill only one man in eight." (The figures are imaginary.) Since these things are also well understood by competent technical witnesses, it is possible for a lawyer to gain their assent to the *possibility* of something very improbable indeed. This was done to good effect by Marshall Hall in his examination of the doctors in the Greenwood case.

He was assisted by a common confusion between absolute and relative magnitude. In his addresses to the jury and his cross-examination of the medical witnesses for the Crown, he would draw attention to the very small quantities of arsenic found in the body (small, that is, in the absolute sense). Could they be sure, he would say, that no mistake had been made in their experiments when they had such minute quantities to deal with? But when cross-examining Dr. Griffiths about the morphia that he had given his deceased patient, Marshall Hall spoke of *a whole grain* as though it were a very large quantity—which indeed it is, if considered as a dose for a human being. The fact is that *great* and *small*, like other value judgments, are meaningless terms unless a standard of comparison is stated or implied. Anything whatever may be called *small* in reference to something else. A hydrogen atom is a small atom; a dime is a small coin; a small house may be

thirty feet high; a small country a hundred miles across; and a small planet about the size of the earth we live on.

This is perhaps a good place to summarise what has been said about evaluations.

1. Things that cannot be measured should not be confused with things that can. This is not to disparage unmeasurable things or to say that evaluations of them are meaningless. On the contrary, they include the most important things in life, and evaluations of them are among the most significant statements that can be made.

2. All evaluations, unless verifiable, are matters of opinion and therefore give information about the person who makes them.

3. Unverifiable evaluations become more significant if a standard of comparison is provided.

4. Numerical but unverified evaluations, if honest, are statements of probability, and can be sworn to only as such.

5. Relative and absolute magnitudes should not be confused.

6. Any numerical statement includes a claim of a certain degree of precision, and this claim may require scrutiny.

Whether they understand these principles or not, lawyers do not always observe them closely when they are handling witnesses in court. Witnesses are seldom allowed by counsel to dwell for long in the shadowy regions between affirmation and denial, though it may be that truth dwells there. If a witness describes someone as unbalanced or neurotic, he is liable to be asked: "What, do you mean that he is a lunatic?" In the Greenwood case, Marshall Hall pressed the doctors on the other side to choose between two extremes: the patient had either to be perfectly safe or likely to die before the morning. When he asked Dr. Willcox about the symptoms of the deceased, he asked him which of them was *entirely inconsistent* with gastric trouble. The doctor could point to none, so that Marshall Hall in his closing speech was able to assert that the symptoms did not point to arsenical poisoning at all. His demand for a symptom characteristic of arsenical poisoning and entirely inconsistent with any other cause is, however, one that cannot in any circumstances be satisfied.

A most ingenious example of this device—the offer to a witness of a choice between two extremes, neither representing the truth—is to be found in Herman and Goldberg's *You May Cross-Examine*:

You are a bitter enemy of the defendant, are you not?

No, sir.

Are you on friendly terms with him?

I have nothing against him.

That was not the question. I asked you, are you on friendly terms with the defendant?

Yes, sir.

Then am I to understand that you are a friend of his?

Well, yes.

Were you subpoenaed to come here and testify against him?

No.

You came as a friend?

I came because the plaintiff asked me to come.

But you came voluntarily?

Yes.

You came voluntarily to blacken the name of your friend?

The witness was “on friendly terms” with the defendant in the sense that one is on friendly terms with many people whom one

often sees but who are not one's friends. The witness, as he truthfully said, had nothing against him. But he was not allowed to draw the distinction between being on friendly terms with someone and being a friend of his, even if the distinction occurred to him while he was on the witness stand. Instead, he was invited to choose between being "a bitter enemy" of the defendant and being "a friend of his," and since neither choice correctly represented the facts, it was easy for cross-examining counsel to discredit him.

The yes or no, right or wrong, all or none attitude was accurately described by Hitler in *Mein Kampf*. "The broad masses," he wrote, "cannot understand the gradations between right and wrong . . . let us therefore avoid gradations and present them only with a positive or a negative, hatred or love, truth or lies, never half this and half that." The attitude is hostile to truth. An intelligent man measures everything not with one scale but with several. His judgment is, to use the jargon of the psychologists, *multivalent*. He knows that nothing is either wholly good or wholly bad; that nothing can ever be described with perfect accuracy; and that the distinctions we are bound to draw are sharp lines in regions where nature has only insensible gradations. The single-minded attitude characteristic of low intelligence and defective education is specially ill adjusted to reality when it springs from personal experience, limited as this must always be. A person so unfortunate as to suffer from these handicaps judges political questions either as a Republican or a Democrat; he is indifferent to any other way of estimating them. His feelings about a foreign country are either wholly favorable or wholly hostile. He hates France because a French waiter once gave him short change; he likes Germany because he likes his German brother-in-law. The same simple-minded approach decides his opinions about labor unions or bankers or other topics of controversy. How far from this crudity are the many-valued responses of a scholar! His thoughts and feelings about an institution—the Catholic Church for example—far from consisting of uncritical devotion or ignorant hostility, are made up of a complex group of intellectual and emotional responses of a largely

impersonal character. His knowledge of history and of the religion and politics of his own day enables him to see his own experience of the church and its members as merely the closest part of a variegated whole. His friendship with a Catholic priest whom he greatly admires carries comparatively little weight with him, for he knows that his friend is but one of many. He is more anxious to understand the church than to judge it. This unwillingness to form moral opinions is characteristic of a multi-valued approach. It is not the moral indifference of the man who says, "I don't care what happens if it doesn't happen to me," but the wisdom of whoever it was that first said, "Tout comprendre, c'est tout pardonner."

The cultivation of such multivalent attitudes, which is mainly a matter of study and reflection, is therefore much to be preferred, by men of sense, to intemperate excursions in directions hastily chosen. Amid the confused standards of the present time, when moral choices are so likely to be mistaken, and single-valued judgments certain to be, the development of many-valued opinions is more than ever a duty. The cultivation of such many-valued attitudes in the courts, and their expression in the most flexible and sensitive language that he has at his command, is a task to which the student of forensic English need not be ashamed to devote his talents and his time.

CASES

The Proceedings against

Queen Caroline

CHAPTER VII

CAROLINE OF BRUNSWICK, the wife of George IV, was certainly one of the less fortunate princesses to occupy the throne of England. Indeed, she occupied it only in a metaphorical sense, for at her husband's coronation in 1821 she was turned away, by his orders, from the door of Westminster Abbey, and she died soon afterwards. Her trial before the House of Lords in the previous year, on a charge of conducting an adulterous intrigue with her courier or chamberlain, was by far the most celebrated trial of its time. "Since I have been in the world," wrote Greville in his *Journals*, "I never remember any question which so exclusively occupied everybody's attention, and so completely absorbed men's thoughts and engrossed conversation." But at the present day, when the scandals and personal jealousies of that era have lost their interest, the trial is still worthy of study because of the extraordinary skill and eloquence shown by the lawyers on both sides, but especially by Brougham, Denman, and Williams for the Queen.

Caroline had married her husband long before he became king. At that time he had as Prince of Wales accumulated debts of nearly a million pounds, and in return for a large sum in cash he agreed to provide the nation with a future queen and perhaps an heir to the throne. The fact that he was already secretly married to another lady, Mrs. Fitzherbert, was not regarded as a sufficient obstacle. Caroline's married life was a miserable affair from the first. Bride and groom had never seen each other before the

betrothal, and when Caroline, who had been brought to London, was led into the presence of her future husband, he called for a glass of brandy and left the room. At the wedding he was drunk. There was a child, the Princess Charlotte, but the parents soon separated, and the education of their daughter became only another source of disagreement between them. George III, in the time allowed him by recurrent attacks of insanity, tried hard to reconcile his eldest son and his daughter-in-law, to whom the old king was sincerely attached, but his efforts were unsuccessful. For some years the Princess of Wales resided at Blackheath, near London. She was never able to adapt herself to the strict ceremonial expected in those days of the reigning house in their public behavior—their conduct in private was as loose as it could be—and in 1806 the hostility of her husband led him to appoint a secret commission, the so-called Delicate Investigation, in the hope that something could be proved against her. There was evidence for nothing more serious than “unseemly levity,” for which the Princess was censured. Her life in England became impossibly difficult; men and women who had anything to hope for from their future sovereign could not afford to be seen in her company; she was not admitted to the court of her husband (who on the incurable madness of his father had become Prince Regent); and in 1814 she left England to live on the Continent. Her travels in the following three years were the object of the minute enquiries that preceded her trial. In foreign countries she was not entirely free from the difficulties that had beset her at home. English travelers, if they were prominent people, often avoided her because they were afraid of what might be said of them to the Prince Regent, and at the courts of Europe considerations of state policy made it imprudent to show much courtesy to his estranged wife. Caroline was a woman who liked gaiety and social distractions. Debarred from the society of those who would normally have been her companions, she was driven to make friends with those who would accept her friendship, unworthy though they often were of the confidence that she gave them. The suite that she had brought from England likewise

found that the conditions of their social life were disagreeable, and on one excuse or another most of them deserted her soon after her travels began, thus leaving her more and more to the company of her new intimates.

After a brief visit to her old home at the court of Brunswick, the Princess of Wales traveled to Milan. It was there that she took into her service as courier Bartholomew Bergami, six feet tall, and with "a magnificent head of black hair, pale complexion, and mustachios reaching from here to London." From Milan she went to Rome and Naples, then to Venice, Lugano, and Como. In November 1815 she traveled to Sicily on a British man-of-war, and from there undertook an extensive tour of the Mediterranean, visiting Troy, Tunis, Ephesus, and Jerusalem. After leaving Jerusalem, she embarked at Jaffa on a polacre, an Italian vessel that she chartered to bring herself and her suite back to Italy, and that was to be much discussed at the trial. In 1817 she heard of the death of her only child, the Princess Charlotte, who after a brief but happy married life with Prince Leopold of Coburg died in childbirth. In January 1820 came the death of George III, an event which, though it had been long expected, found the new king and his wife unprepared with any agreement as to what their future relations were to be.

Hurried efforts were made on the part of the King and the government to persuade Caroline to stay out of England. The ministers offered her a large income for life, and they would probably have been successful (for there was little that could make England an attractive residence for the rejected wife) had not George stubbornly insisted that her name must be removed from the Anglican prayer book. If precedent had been followed, the prayer for the royal family would have run: "That it may please Thee to bless and preserve our gracious Queen, Caroline, their Royal Highnesses the Duke and Duchess of York, and all the Royal Family." When the ministers, determined to omit specific mention of her name, excused themselves on the ground that she was included in the

general prayer for the royal family, they drew the famous retort from Denman, one of her principal supporters in the House of Commons: "If her Majesty is included in any general prayer, it is the prayer for all who are desolate and oppressed."

Determined to claim her position on the throne, Caroline made up her mind to return to England. Her popularity there was enormous, not so much for any qualities of her own, as because of the odious treatment that she had received from her husband. When she landed at Dover, a royal salute was fired from the castle and a great crowd assembled to greet her. The enthusiasm of the people grew still more boisterous as she traveled towards London; they unharnessed the horses from her coach and drew it themselves through the streets. Her arrival in the capital, and the disorders which accompanied it, made it necessary for the ministers to put into operation at once a plan which had been formed two years before. In 1818, with just such a contingency in mind, they had dispatched two lawyers to Italy to collect evidence of any behavior on the part of Caroline that might enable her husband to divorce her. The commission set up an office in Milan, and the evidence that they had sent to England, enclosed in a green bag that figures in most of the cartoons and skits of the period, was now brought before the House of Lords, who were invited "to deprive her Majesty Queen Caroline Amelia Elizabeth of the title, prerogative rights, privileges, and exemptions of Queen Consort of this realm, and to dissolve the marriage between his Majesty and the said Caroline Amelia Elizabeth." The grounds for divorce were stated in the bill to be the adulterous intrigue alleged to have been carried on between the Princess of Wales and her chamberlain, Bergami.

The proceedings in the House of Lords were to be legislative, not judicial. The bill was to be supported by the Attorney-General and the Solicitor-General, and the Queen was to be represented by counsel. She had appointed her own law officers. Her Attorney-General was Henry Brougham, afterwards Lord Chancellor, and

her Solicitor-General was Thomas Denman, afterwards Lord Chief Justice. They were assisted by four other counsel, all of whom later became judges, and who included John Williams, and Dr. Stephen Lushington, well known to students of the literary history of the time as the adviser to whom in 1816 Lady Byron confided the secret reason for her separation from her husband. The house was presided over by the Lord Chancellor, the notorious Lord Eldon, to whom Shelley had recently addressed a poem beginning "Thy country's curse is on thee," and who was a warm partisan of the bill. All the members of the house were eligible to sit and vote, including the King's brothers and some other peers who made even less pretence of impartiality. A few left the house at the conclusion of the case for the bill, returning only to vote in favor of it. The measure of success achieved by the Queen's advocates before such a tribunal is a proof of the remarkable skill that they showed in conducting a difficult case.

The opening of the trial was the signal for tumultuous popular demonstrations in favor of the Queen. Strong wooden barricades had been erected to enclose the space in front of the House of Lords, but these were swept away in a moment. The Queen drove to her trial in a new state carriage drawn by six bay horses. She was dressed in black, "with a rich white lace veil, which flowed gracefully over her shoulders, and hung like an antique vestment over her dress." She repeatedly bowed to the cheering people, and wore an expression of great dignity and fortitude. The loudest cheers were heard as her carriage passed Carlton House, the residence of her husband. After some hesitation, the sentinels at the gates presented arms.

The feeling of the people did not show itself merely by demonstrations in the streets. There was serious apprehension of organised disturbances in London and even of civil war. A regiment of the Guards failed in their discipline and had to be marched out of town, and it became difficult to secure the safety of prominent statesmen, including even the Duke of Wellington, who were supposed to be hostile to the Queen. Creevey, the diarist, witnessed

the arrival of the duke at the House of Lords, and recorded the look of surprise and annoyance with which he greeted the shouts and hisses of the mob. Creevey, as a member of the House of Commons, had a seat reserved for him at the trial. It was within two yards of the chair assigned to the Queen, so that he was able to see her clearly. This is what he wrote of her appearance:

I had been taught to believe she was as much improved in looks as in dignity of manners; it is therefore with much pain I am obliged to observe that the nearest resemblance I can recollect to this much-injured Princess is a toy which you used to call Fanny Royds [a Dutch toy with a round bottom, weighted with lead, so that it always jumps erect in whatever position it is laid]. There is another toy of a rabbit or a cat, whose tail you squeeze under its body, and then out it jumps in half a minute off the ground into the air. The first of these toys you must suppose to represent the person of the Queen; the latter the manner by which she popped all at once into the House, made a *duck* at the throne, another to the Peers, and a concluding jump into the chair which was placed for her. . . . She squatted into her chair with such a grace that the gown is at this moment hanging over every part of it—both back and elbows.

In the preliminary speeches before the opening of the case, Brougham set the tone of his forthcoming remarks by a sarcastic reference to the army scandal of twelve years before, when it had been discovered that commissions in the army, of which the Duke of York, brother of the Prince Regent, was then Commander-in-Chief, had to be purchased from his mistress, Mrs. Clarke. Was immorality in the royal family, Brougham asked, censurable only when the sinner was a woman? Throughout the trial the counsel for the Queen showed the same readiness to strike back at her accusers, a design that was facilitated by the well-known profligacy of the royal family, accurately described in Shelley's famous lines:

An old, mad, blind, despised, and dying king,—
Princes, the dregs of their dull race, who flow
Through public scorn,—mud from a muddy spring.

The Attorney-General, Sir Robert Gifford, opened his case on August 19, 1820. Loud peals of thunder interrupted the silence that pervaded the house as he rose to speak. His address, in which he outlined the charges against the Queen, was brief, and chiefly remarkable, as it later appeared, for the difference between what he claimed in his opening and what he was able to prove in evidence. He relied not so much on facts as on interpretations heightened by the use of bias words. In alluding, for example, to a costume worn by the Queen at a ball at Naples, he said, "the dress she wore upon this occasion (or rather the want of it, in part) was extremely indecent and disgusting," an assertion which his own witnesses were unable to confirm, and he claimed that the Queen had been heard kissing Bergami in his room, adding that "he was aware of the reluctance with which their lordships must listen to these disgusting details." In the evidence, the sound of kissing turned out only to be the sound of whispering. But the pious horror of the Attorney-General reached a climax when towards the end of his speech he described a dance that had been performed for the amusement of the Queen.

On her return from the East (said the Attorney-General), she brought in her train a man, who, from the accounts given of him by the witnesses, appeared to have been a man of brutal and depraved manners to the last degree: his name was Mahomet, who, at the Villa d'Este, at various times, exhibited the most atrocious indecencies in the presence of her majesty, Bergami being present with her majesty during the time of those exhibitions. They were of so indecent and detestable a character, that it was with the greatest pain he [the Attorney-General] could even mention them. Here it might be said that these circumstances did not prove adultery; but if it were proved, the preamble of the bill, he should contend, was made out. It would excite in their lordships a feeling that it proved more,—not merely indecency, and disgusting indecency, but a want of all moral feeling. He said, that the woman who could demean and degrade herself to be present at such an exhibition,—he said, and no man could doubt, that such a woman was capable, not only of sacrificing her virtue, but that in the most undisguised and disgusting manner.

This dance became a conspicuous feature of the case. The descriptions of it by the various witnesses and by the counsel on either side are useful examples of virtuosity in displaying the same fact in different lights. According to one side, the dance was an undisguised and libidinous representation of the sexual act of a kind that could be witnessed only in a brothel on the waterfront; whereas the other side maintained that it was an innocent performance that could be seen in all Mediterranean countries and to which a man could confidently invite his wife and daughters. The most detailed description was given by Majocchi, one of the important witnesses against the Queen:

Describe what this *joco* was, to which you allude, before the princess.

Here the witness moved his body up and down, with a sort of dancing motion, occasionally extending his arms and snapping his fingers, as if using castanets, in a fandango.*

Was anything done by Mahomet, upon that occasion, with any part of his dress?

He made use of the linen of his *brachese*, or large pantaloons.

Describe what use he made of the linen of his large pantaloons, and what he did with it.

He made the pantaloons go backwards and forwards (*moving his person backwards and forwards*).

Before he began, or during the time of this motion, did he make any arrangement or any alteration as to his pantaloons; did he do anything with the linen of his pantaloons or trowsers?

This I do not know.

* The imagination dwells with pleasure on this remarkable performance before the usually so decorous house of peers.

Describe this *joco* from beginning to end, everything that was done as nearly as you can recollect, whether with his pantaloons, his turban, or any other part of his dress.

Here the witness pulled up his trowsers, and repeated his imitation of the *joco* of Mahomet as before. The interpreter said their lordships saw the motion the witness made, and could judge of it as well as he.

Mr. Brougham said the motion the man was making might be described in one short word,—a curtsy. Some peers called out, *No, no.*

Describe with accuracy what was done with the pantaloons or trowsers; how were the trowsers prepared?

He made them strike forward—go backwards and forwards.

Did he do anything to the trowsers with his hands, either at or during the time when these motions were going on?

I have not seen it.

Was the position of his trowsers the same as usual?

Always in the same state.

On subsequent occasions counsel for the Queen showed much ingenuity in finding innocent descriptions of Mahomet's dance. Brougham's word *curtsey* did not meet with universal approval, and they tried to suggest either that it was a ballroom dance—*fandango, the Spanish bolero, the Negro dance, this Arabian dance, a ridiculous dance*—or else something that might be performed on a stage (and therefore must be respectable). Brougham spoke of Mahomet as *the black performer*, and his dance was described as *sports, tricks, a display of buffoonery, and exhibitions on the stage*. In Dr. Lushington's final speech for the defence he reinforced the suggestion of a stage performance:

With regard to Mahomet's dances, he had no sooner heard the account given of them than he had set on foot some enquiry concerning him. He was now happy to inform their lordships that Mahomet was on his way to this country, that Mr. Elliston had kindly given him an engagement, and that their lordships would soon have an opportunity themselves of witnessing his exhibitions on a somewhat wider stage—*viz.*, at Drury Lane Theatre. (A laugh).

Theodore Majocchi, the first prosecution witness, was a postilion or courier who had been in the service of the Queen. When he appeared before the bar, she fixed her eyes on him and in a piercing tone exclaimed, "Theodore! Theodore!" or possibly "Tradidore! Tradidore!" (traitor). He got through his examination-in-chief without difficulty; not so his cross-examination by Brougham, which competent judges have declared to be a masterpiece of forensic skill, and which brought a new catchword into the language—*non mi ricordo* (I do not remember).^{*} It began briskly enough:

You have told us that you left General Pino's service; was not it on account of killing a horse, or something of that kind?

No.

You never killed a horse at all?

Never, never, oh never.

You never told anyone that you had?

Never, never.

It was not long before the *non mi ricordo's* began to appear, and soon the witness returned this answer to almost every question.

^{*} About this time Sir Walter Scott was asked in company whether he had written the Waverley novels, whose authorship he had never admitted. "*Non mi ricordo*," was his reply.

There can be little doubt that his evidence was concocted; that he had been well drilled by the Milan commission; and that he was afraid of involving himself in contradictions if he departed at all from the narrative in which he had been rehearsed. Brougham was able to show that this witness combined a minute recollection of some particulars with a total forgetfulness of others, and he made it clear in his final speech that the combination pointed to perjury.

After an hour or two of cross-examination Majocchi was in a state so nearly approaching collapse that the interpreter could not make himself understood. "The witness," he said, "is frightened out of his wits; he does not understand the most common words; I cannot make him understand the question." Brougham remorselessly continued to take him over every detail of his evidence. As the afternoon drew on, one of the peers remarked that the time for adjournment had arrived, but Brougham was not to be stopped. "May I implore your lordships," he said, "to allow me to proceed? In all courts—I mean in all courts where justice is administered,—I need not have made this humble request." The sarcasm in his reference to the house was not lost on its members, and he was permitted to continue. He soon began to question Majocchi on the means which had been adopted to get him before Colonel Brown, of the Milan commission. The object of these questions was to establish the fact that Majocchi and his father were indigent persons who had been paid to give evidence:

You have seen Colonel Brown, have not you, when you were in the service of the Marchese di Odescalchi?

Not during his service, but after my father came to fetch me.

What induced you to leave the service of the Marchese Odescalchi, whom you liked so well as to accompany him to Vienna, and to go back with this respectable old carter to Milan?

My father told me to go to Milan together with him, and I went to Milan together with my father.

Did you go to Milan because your father desired you, merely from respect for the orders of your parent?

No, he told me that at Milan there was Colonel Brown, who wanted to speak to me.

Did you not humbly represent upon that occasion, that your bread depended upon your place in Marquess Odescalchi's family?

Yes.

But still he told you to go and speak to Colonel Brown, and therefore you went with him to speak to Colonel Brown?

Yes.

Do you go everywhere whenever anybody comes to say to you Colonel Brown wants to speak to you; do you immediately leave your place to go to him?

When my father told me so, I went to Colonel Brown directly.

If your father were to go and ask you to speak to Colonel Black, would you go also there?

The witness did not reply.

Did you ever before go, at your father's desire, any where to speak to Colonel Brown, or Colonel any body else?

Never, before my father spoke to me, I never went to any place.

Had you ever seen Colonel Brown before you went to speak to him at Milan?

Never.

How did you support yourself on the journey from Vienna to Milan to speak to Colonel Brown?

My father paid my journey.

Has he made a private fortune by the lucrative trade of a carter or waggoner?

No, he has not made a fortune as a carrier.

Has your father any money at all, except what he makes from day to day by his trade?

I do not know.

Did your father and you live pretty comfortably on the road from Vienna to Milan, when you were going in order to speak to Colonel Brown?

We wanted nothing.

In what sort of a carriage did you go?

A carratina, or small calash, a cart.

When you got to Milan, did your father introduce you to this Colonel, to whom you had come so far to speak?

Yes.

Did you complain to Colonel Brown of the loss you had sustained by giving up a good master and a good place?

I do not remember.

Had you made any bargain with the Marquess Odescalchi before leaving here, that he was to take you back when you got back from Milan, after your conversation with Colonel Brown?

I do not recollect.

Have you any doubt, that you will state on your oath here, that you made no such bargain whatever with the Marquess Odescalchi?

I do not remember.

Though the cross-examination much reduced the credit of this witness, it must be admitted that his *non mi ricordo's* saved him from being exposed in any major contradictions. Like all the other Italian witnesses, he had been brought over by the government. When the first party landed at Dover, a riot broke out in which many of them were severely beaten by the infuriated citizens. In London it was accordingly necessary to keep the witnesses in strict seclusion to protect them from the mob. They were lodged in a building near the House of Lords, protected on the land side by iron doors and guarded by a police boat on the river. It was naturally assumed that Majocchi, who like the other Italians was examined through an interpreter, was paying his first visit to England. But after the first day's cross-examination Brougham received word from someone who had recognised him that Majocchi had been in England before. He was recalled, and admitted that while in England he had always spoken highly of the Princess of Wales: she was "a good woman." This admission likewise did much to discredit his testimony.

It became clear from the witnesses who followed Majocchi that the Princess of Wales had at the least been guilty of indiscreet and unguarded behavior. But they did not make a favorable impression on the house. The stories they had to tell were often squalid—it was a case, as Denman later said, of keyholes and chamber pots—and whereas some seemed to be quite at home in discussions of this kind others evinced an unseasonable modesty. "You will pardon me," said a Karlsruhe chambermaid when asked a searching question, "I have not reflected on this; I have had no thoughts on it whatever." It also appeared that they had all been paid to give evidence. Whether the money was *compensation* for loss of time or *recompense* for telling their stories was difficult to deter-

mine; the prosecution maintained that it was the first, the defence that it was the second.

The nature of the tribunal and the absence of a jury had its natural effect on the techniques used by counsel taking part in the trial. The members of the House of Lords at that time, though many of them were very far from being patterns of morality, were all educated men, and most of them were well acquainted with counsel at the bar. Forensic arts which might have been successful with a jury were unlikely to be effective with such an audience. Brougham's attitude towards counsel on the other side was also affected by these considerations. This is what he said about the Solicitor-General:

He (Mr. Brougham) felt infinitely more awe in approaching his most learned coadjutor, because he knew his habit always was to tell the opponent who "touched him near"—"Go away, Sir; you are no lawyer—you can be no lawyer—you are only the queen's Attorney-General, but I am the king's Solicitor-General; therefore I am a lawyer, and a most accomplished lawyer." That was a fact he (Mr. Brougham) could not dispute or traverse, and that alone was enough to deter him from attempting to grapple with any of the arguments adduced: he felt a conscious inferiority: he was aware that he was far below the king's Solicitor-General in rank and in knowledge: the Solicitor-General might say that he was only "a little lower than the angels," and very little it was, if his own opinion were to be taken: the wonder therefore was that with all his learning and greatness he could condescend to mis-state the arguments used against him. He (Mr. Brougham) felt the highest admiration for the great man of whom he was speaking: nothing he could say could add one leaf to the wreath of laurel he had obtained—nothing he could advance could give one more spark to the glory both he (the Solicitor-General) and his powerful coadjutor had been daily increasing during this investigation, and before the patrons of this bill, to whom they were indebted for their well-merited professional promotion. *Proprio Marte* they had acquired immortal reputation, and melancholy it was to reflect, that even these men, the most illustrious and exalted of their species, had still some taint of the frailty of our common nature.

The following interruption in the examination of a chambermaid by the Solicitor-General likewise discloses an attitude to social differences that Brougham might not have cared to reveal to a jury:

Did you make any observation on the manners of the Countess of Oldi? In your judgment were they the manners of a lady of distinction or not?

Cries of No! No! interrupted the reply of the witness.

Mr. Brougham: We make no objection to the question: we beg that the opinion of this Swiss chambermaid on the manners of ladies of distinction may be put down and registered.

Did you make any observation upon the manners of the Countess Oldi; whether they were the manners, in your judgment, of a gentlewoman or not?

The interpreter stated, that he was under a difficulty in interpreting that question; as there was not such a word as "gentlewoman" in the French language. (This remark occasioned much laughter.)

With the possible exception of Majocchi, the most important witness for the prosecution was Louisa Demont, who had been Caroline's personal maid during the years of her travels. A contemporary description of the lady runs as follows:

This witness, of whom the public have heard so much, wore a handsome black satin hat, ornamented with feathers; a muslin ruff, highly plaited; a white silk handkerchief over her neck and bosom, and a black satin gown, vandyked at the top, and profusely decorated with flounces at bottom. She is the smartest-dressed of *femmes de chambre*, but neither the youngest nor the prettiest. She seems to be about thirty-six years of age: in complexion she is a *brunette*; her cheeks sunk and shrivelled, and her eye more remarkable for an expression of cunning than of intellect. She advanced to the bar with a degree of confidence which even the

penetrating glance of Mr. Brougham, who eyed her most perseveringly "from top to toe," did not at all affect.

She was a Swiss, and gave her evidence in French; the interpreters had trouble with it, as they did with that of the other foreigners. The French word *gorge* was one of those that gave rise to uncertainty:

How was the upper part of the person, covered or uncovered, in the picture?

Uncovered.

How was the breast, was that covered or uncovered?

Uncovered.

Mr. Garston stated that the other interpreter had used the word "gorge" in putting the question, and that that means the neck rather than the bosom; that it is sometimes used to imply it, but not generally.

You have described that a part of the person was uncovered, how low did the part that was uncovered extend?

As far as here. (Passing her hand across her breasts.)

Were the breasts covered or uncovered?

It was uncovered as far as here, about the middle of it.

Her evidence-in-chief was damaging enough to the Queen, but her cross-examination by John Williams left the witness little credit. When it was over, Creevey noted exultantly in his diary:

The *chienne* Demont turns out everything one could wish on her cross-examination. Her letters have been produced written to her sister living still in the Queen's service. They contain every

kind of panegyric upon the Queen, and she often writes of a journal or diary she has kept of everything that has occurred during the whole of her service and travels with the Queen; the object of such journal being, as she says, to do the Queen justice, and to show how she was received, applauded, cherished, wherever she went.

It must be admitted that without these letters counsel would have found it difficult to challenge this witness in the main lines of her testimony. He was able to show that she had changed her name on coming to England; that she had on occasion allowed herself to be addressed as "Countess"; that she had been dismissed from the service of the Princess for lying; and that she had applied to be taken back. But Williams had in his hand letters in Demont's handwriting in which she described the Queen to her sister in terms of unmeasured eulogy. Some of the cross-examination follows. Counsel for the Queen were afterwards able to have the letters put in as evidence.

Was it not in the month of November 1817 that you quitted the service of the princess?

Yes.

Of course, at that time you knew all respecting the princess that you have been deposing to before their lordships for two days back?

Yes.

Since the time that you quitted the service, or were discharged from the service of the princess, have you never represented the character of the princess to be of a very high description, of an excellent description?

I do not recollect.

Will you swear you have never represented, that you would surrender half your life if she could but read your heart?

I may have said that, but I do not recollect it.

Do you remember never having said, or written, or represented, that if the princess could read your heart, she would then be convinced of the infinite respect, the unlimited attachment, and the perfect affection, you entertained for her august person?

I recollect to have written several times to my sister, but I do not recollect the contents of my letter.

Will you swear that you did not write to your sister to that effect after you were discharged?

I have written to my sister.

Will you swear that you did not write to the effect that has just been stated to you?

I wrote home in my journey to Count Scavini.

The question refers to your writing to your sister?

I wrote several times to my sister.

Will you swear that you did not express yourself in the manner or to the effect described, in a letter to your sister, since you were discharged?

I have written several times to my sister, and I know I have spoken of her royal highness; but I do not recollect the expressions I have used.

You are asked to the effect?

Am I asked if I have written in the same sense, if I have said those words?

To the same effect in any words?

If I have written expressly for that.

Have you expressed yourself in these words, or to the sense, "If the princess could but read my heart she would then be convinced of the infinite respect, the unlimited attachment, and the perfect affection I have always entertained for her august person"?

I have written to my sister, but I cannot exactly recall the expressions; it was in that sense, in that meaning.

Will you swear you did not use those very expressions, beginning with the words, "Oh! God, I would surrender half my life if she could read my heart"?

I may have used these expressions, because at that time I was much attached to her royal highness.

That was some time after you had been discharged, was it not?

It was not very long after.

Have you not to the same sister written, "How often in a numerous circle have I with enthusiasm enumerated her great qualities, her rare talents, her mildness, her patience, her charity, in short, all the perfections which she possesses in so eminent a degree"?

I do not recollect whether I have made use of those expressions, but I have written to my sister, and I have spoken of the manner in which she conducted herself towards me.

Have you not used the very expressions that have been just put to you?

I do not recollect exactly whether I have used the same expressions, but I have written in the same sense; I do not recollect the expressions.

Then you will not swear that you have not used those very expressions?

I will not swear that I have made use of them, nor that I have not made use of them.

But to the same sense you admit?

The sense, yes.

Do you not remember this, "How often have I seen my hearers affected, and heard them exclaim that the world is unjust, to cause so much unhappiness to one who deserves it so little"?

I do not recollect whether I used those expressions.

"And who is so worthy of being happy"?

I do not remember the expressions.

Have you not written to that effect?

I have written to my sister several times to that effect, in that sense.

Will you swear that you have not used those very expressions, those very words?

I cannot recollect whether I have made use of them exactly.

You will not swear that you have not?

I will not swear that I have made use of them, nor that I have not made use of them.

When the witness was invited to explain the stark discrepancies between what she had written to her sister and what she had stated in evidence, she explained that she had been afraid that her letters to her sister, who was at that time in the service of the Princess, would be intercepted and communicated to her mistress. She described the kind words that she had written of the Princess as a *double entendre*, intended to convey to her sister a meaning opposite to the plain meaning of the words. Williams later referred to "that odious monosyllable, which he would here, for the sake of delicacy, merely call, in a borrowed phrase of her own, a

double entendre." He meant an ordinary lie, and the words *double entendre* were effectively used in this sense by his colleagues in their later speeches.

The next run of witnesses were Italian couriers and footmen, two of whom deposed to having seen familiarities between Bergami and the Princess which, though short of actual intercourse, could leave no doubt as to the relations between parties who had been detected in them. Not much could be done at the time to controvert their testimony, though Denman did his best with Rastelli, whose cross-examination began as follows:

When were you dismissed from the service of the princess?

Towards the end of December, 1817.

Were you not discharged for stealing the corn?

No.

Was not that the charge on which you were dismissed?

No.

What were you dismissed for?

Because I gave leave to two of our men to go to the inn, to the tavern; and Bernardo, the cousin of the baron and some others went to stop these men, and when these men came to complain to me of it, I said I never knew that a master should be a thief-catcher, thief-taker (*sbirro*).

Interpreter: It is a constable, but a low kind of constable, and in Italy it is rather a term of reproach.

The witness proceeded: And then the day after that, Louis came with the money that was due to me for three months' salary, and told me that as I was an honest man I ought not to be among the *sbirri* any longer; so I took the money and went away.

You say you were dismissed on that account?

Yes.

Were you never charged, when in the service of the Princess of Wales, with stealing the horse provender?

Never.

The question does not refer to a charge before a magistrate, but were you not charged in the family of the princess, or by herself, with having stolen the horse provender?

No, never.

You swear to that as you do to all the rest of your evidence?

I do.

You never said that to any body, that you had been dismissed on a charge of stealing corn, did you?

I could never tell this lie.

Do you mean that you never tell a lie, or never without being well paid for it?

When the Solicitor-General summed up his case, he did not fail to point out (what was true) that his most important witnesses had not been shaken on questions of fact.

In dealing with Majocchi's evidence, he attempted in the following words to remove the unfortunate impression left by the *non mi ricordo's*:

He (the Solicitor-General) did declare, that, as it appeared to him, during a cross-examination of seven hours, extending over a period of three years, and going through a variety of complicated facts, in no one instance had that witness been betrayed into inconsistency. Certainly the witness had repeatedly used the phrase

(perhaps of equivocal import) "I do not remember"; and the changes which had been rung upon that circumstance might produce an impression upon low minds, although it could produce none upon the minds of their lordships. But it was impossible not to perceive the artifice—the "let us have a few more *non mi ricordo's*"; and it was equally impossible not to perceive that to the questions proposed the witness could return no other answer.

The two-day speech with which Brougham opened the defence is universally agreed to have been the most brilliant in the career of this extraordinarily able advocate. A peer who heard it called it "one of the most powerful orations that ever proceeded from human lips," and even the irreverent Creevey, though he left the House in the middle because he found the place "damned dull and damned hot," came back for the end and declared, "I never heard him in anything like the perfection he has displayed in all ways." Greville wrote that "Brougham's speech was the most magnificent display of argument and oratory that has been heard for years, and they say that the impression it made upon the House was immense; even his most violent opponents (including Lord Lonsdale) were struck with admiration and astonishment." Even to those who can only read the speech instead of hearing it, it can still appeal as an admirably successful blending of factual and emotive passages.

He began in a quiet tone of voice suited to the feelings that he wished to produce in his hearers. He wanted at this point to distract their minds from the sordid details that had been heard in evidence, and to impress upon their feelings the magnitude of the cause that was to be tried. His own conviction of the Queen's innocence, and the supposed public unanimity on this subject, far from being emphatically enunciated, were casually introduced in a couple of parentheses, as though they were too plainly evident to need expression. The tone of self-abasement, which was certainly assumed, for Brougham was the most confident of men, and well knew that his life opportunity had come to him, was probably

intended partly to magnify the importance of his cause (and hence to generate the right feelings about it), and partly to mollify certain peers who had complained that in the early part of the case he had treated them too cavalierly. The opening follows:

The time had now arrived when it became his duty to address himself to their lordships in defence of his illustrious client. But when the moment which he had so anxiously desired had at length come, he felt the greatest alarm. It was not, however, the august presence of that assembly which oppressed him, for he had often experienced its indulgence; neither was it the novelty of the proceedings that embarrassed him, for to novelty the mind gradually gets accustomed, and becomes at last reconciled to the most extraordinary deviations; nor was it even the great importance and magnitude of the cause he had to defend which perplexed him, for he was borne up in his task with that conviction of its justice, and of the innocence of his illustrious client, which he shared in common with all mankind. But it was even that very conviction which alarmed him—it was the feeling that it operated so zealously and so rightly which now dismayed him, and made him appear before their lordships impressed with the fear that injustice might be done to the case by his unworthy mode of handling it. While, however, other counsel have trembled for fear of guilt in a client, or have been chilled by indifference, or have had to dread the weight of public opinion against them, he had none of these disadvantages to apprehend. Public opinion had already decided on the case, and he had nothing to fear but the consequences of perjury. The apprehension which oppressed him was, that his feeble exertions might have the effect of casting, for the first time, this great cause into doubt, and turning against him the reproaches of those millions of his countrymen now jealously watching the result of these proceedings, and who might perhaps impute it to him if their lordships should reverse that judgment which they had already pronounced upon the charges in the present state of the case. In this situation, with all the time which their lordships had afforded him for reflection, it was difficult for him to compose his mind to the proper discharge of his professional duty; for he was still weighed down with the sense of the heavy responsibility of the task he had undertaken.

Brougham dealt at some length with the failure of the Solicitor-General to substantiate by the evidence of his witnesses what he had claimed in his opening, and in an effective passage he ridiculed the attempt that his adversary had made to represent innocent actions as though they had a guilty significance. In describing a visit that the Queen had paid to a masquerade at a Naples theatre, the Solicitor-General had said:

There was also something extraordinary in the manner in which she was conveyed to this theatre. How did she go? Not publicly, in her own carriage, attended by her suite; not from the public door of her residence, but a common fiacre was stationed behind her house, and she crossed the garden privately, and in the darkness of the night, to this vehicle, which was waiting at the garden-gate.

To this observation Brougham replied as follows:

What a pity that her majesty did not, to suit the view of his learned friends, go to the masquerade in a state-coach, with coachmen in splendid liveries, with lacqueys bedizened out from head to foot with all the pomp and show of state ceremony. What a pity she did not, on such an occasion, adopt this suitable and becoming state paraphernalia, instead of quitting her house in a private coach, instead of going out through a back-door. Why had she not the eyes of the world upon her when she went forth, instead of quietly passing without pomp or show? It was a wonder that his learned friend did not go on and say, "Why did she go in a domino and disguised cap to a masquerade? Who ever before heard of this disguise on such an occasion?"

He was equally forceful in dealing with the much-discussed dance of Mahomet:

Who amongst their lordships could forget the story of Mahomet, and of Mahomet's exhibition, as described in the opening speech of the Attorney-General? He had been represented as a man of brutal and depraved manners, and as exhibiting the most indecent gestures; as actually imitating the sexual intercourse, in order to

furnish amusement to her royal highness. This was a statement which seemed to point to evidence of the most damning kind; it was a statement, too, which effort after effort had been made to substantiate, and in vain. The result of all their inquiries was to prove, that the exhibition so described was nothing more than one of those common displays of buffoonery which had been often witnessed by the purest and most virtuous of those wives and daughters whom it was the happiness of their lordships to possess. Majocchi, the chief witness on the other side, did not even pretend to insinuate, that Mahomet's performance had any thing improper or indelicate about it. With all the Solicitor-General's dexterity of investigation, he had not been able to show Mahomet, the buffoon, in one indecent attitude. Even when the trying question was put with regard to the state of the man's trowsers, what was the answer? why, that they were as usual, that his dress was not at all disordered. Here, then, was an elaborate attempt utterly defeated.

In a passage of calculated reiteration, Brougham claimed that the Queen's actions had been performed with a lack of concealment that was not consistent with guilt:

No hidden places or recesses were selected or chosen by the parties for the free and safe indulgence of their passion from the prying eyes of those about them. They sought no secluded chamber in those places of abomination so well known upon the continent, and which are disguised under the dignified name of palaces. The parties took no opportunity of seeking those hidden haunts of lust which might have been so hastily found. They sought no island among those which were the seat of such scenes in the times of antiquity, when society was less scrupulous of the conduct of its members than now. They sought no haunts among the Capreae of old, to revive in them those lascivious acts of which they were the ancient scene. They acted, on the contrary, before witnesses—they conducted themselves in open day-light, in the face of couriers, servants, and passengers. Was such folly ever known before in the history of human acts? Was ever folly so extravagant disclosed in the most unthinking acts of that youthful period when the blood boils in the veins? Was ever, even then, in that proverbial period of thoughtless levity, a being so recklessly insane as to have acted in this manner? There never was, he believed, such an instance in the history of human passions.

As the trial continued, and as he got a clearer view of the situation before him, Brougham grew increasingly bold in his references to George IV. In this speech he permitted himself a mocking allusion to the illegitimacy of the royal house, which had been called to the throne of England after the expulsion of the Stuart dynasty in 1688. The Queen, he said, "was courteously received by the legitimate sovereign of Baden, and the still more legitimate Bourbon of Palermo. She was courteously treated by the legitimate Stuarts of Sardinia, whose legitimacy stands contradistinguished from the illegitimacy of the family whose possession of the throne of these realms stands upon the basis of public liberty and public rights. She was received even by a prince who ranks higher in point of legitimacy—the Bey of Tunis." George IV can scarcely have been pleased to hear the legitimacy of his own dynasty compared—to its disadvantage—with that of an African potentate. Nor was he spared comparisons between himself and the much-married Henry VIII, whose reign, said Brougham, bore no distant similarity in some respects to the present, and was indeed the era most fertile in precedents for the measure now before them.

Both sides, as might be expected, tried to show that the unusual character of the case gave to their opponents an unfair advantage which should be discounted by the House. The prosecution said that *in such a case as this* they were induced to move only by the enormity of the offence and the conclusive nature of the evidence. Brougham said that the proof had been "left in such a manner as would be deemed fatal *in any ordinary case*." He went on to allege a conspiracy against the Queen, or rather, to allege it in one sentence while disclaiming any intention of doing so in another.

Nothing could be more distant from his intention, than to ascribe a motive too like that motive which was commonly attributed to the other side. Far was it from him to attribute the formation of a conspiracy against the life or dignity of the queen to any individuals, however high in rank or notorious in power . . . He would not say that it was a conspiracy against her majesty; but he would say that no set of conspirators (be they who they might)

could have marked out a common story answerable to their purpose other than that which had been pursued through the entire preparations of the business.

Lovers of subtlety will note the ambiguity, probably intentional, in the first sentence of this passage. Discreditable motives may be *commonly* (i.e., frequently) *attributed to the other side* in all cases at law, or it may be the *common* opinion (i.e., the opinion held by everybody) that *the other side* (i.e., the King's party) has been guilty of conspiracy. Just before the recess, anxious to set the right tone and to leave the right feelings with his hearers, Brougham turned from his analysis of the case to a simple emotive passage likely to appeal to the conservative English peerage:

O, let it not be said, that in that sacred temple, that sanctuary of justice, the peers of England, with a rash hand, had made up their minds to tear down its most venerable symbols, upon grounds so weak and so fallacious, and to sink themselves in eternal condemnation at the tribunal of after-ages.

When he came to a review of the evidence, Brougham had some caustic remarks on the subject of Majocchi:

Here it would be his duty to notice in a particular manner, the first witness, who would be long known in this country, and throughout the world—whose favourite expression would be handed down, much after the same manner as the sayings of some of the ancient sages had reached our days; their names indeed were lost, but they still existed in the celebrity of their brief and pithy sentences. That witness had distinguished himself during this trial by an expression equally brief, and to him more useful: that one sentence appeared to comprise the entire practical result of all the wisdom and all the experience which he had accumulated in the study of his art; and, as long as the words "I don't remember," which he used in the practice of that art, in which he evinced great skill—so long as those words were known in the English language, the image of Majocchi, without the man being named, would forthwith arise to the imagination. . . . It was very manifest that Majocchi was not very willing to give the name, or the trade, or the

place of residence, of any one with whom he had been acquainted; for what reason he (Mr. Brougham) would leave their lordships to judge

His treatment of another two witnesses, though long, is too good to be omitted. These were the captain and mate of the polacre, who had sworn that they had seen familiarities between Bergami and the Queen on the deck of the vessel:

There were other matters in this witness's testimony of a very peculiar character. He (Mr. Brougham) thought that the Princess of Wales, stooping on a bed in a vessel with her arm round a gentleman, and from time to time kissing him, not a very ordinary sight even for nautical men, nor such a sight as they could forget. Yet the master and his mate forgot, or differed most materially in the history of this matter. The mate said, he had seen the queen sitting on Bergami's knee near to the mainmast. He (Mr. Brougham) stated this minutely, because the mate considered it important. The mate meant to say that his evidence was given with particular accuracy, if not correctness. Yet he said it was not on a gun that the queen sat on Bergami's knee. Not one word did he say about kissing and similar facts, the most important of all. Their lordships would, therefore, conclude with him that they did not happen. The captain, on the other hand, stated that it was on a gun, and not at the mainmast, that the queen sat on Bergami's knee. But did they speak to the same time? Yes, for the captain said the mate saw it at the same time. The mate, however, had not seen it; and his learned friends had not dared to ask him any questions respecting it, because the captain had not had time to be trained sufficiently.

He (Mr. Brougham) merely mentioned these circumstances, to show that the story could not be true, because, if it were, such differences would be impossible. Yet those pure, fastidious, and good scrupulous witnesses, from places chaste and sacred as the garden of Eden before the fall—from Messina and Naples—displayed a nicety of moral caution that was exceedingly exemplary. The captain, because the queen was seen leaning over Bergami without touching him, desired the mate to go away, because, on account of their relation as master and mate, he was bound to protect his morals, and also because the ties of blood imposed a responsibility upon his conscience. Therefore he would not let his mate be near

that part of the ship. He never said that the queen wished him to withdraw, or that there had been any order from Bergami; the guilty pair cared not who saw them; but the virtuous Gargiulo, reviving, in the modern Mediterranean, a nicer sense of purity than the ancient ocean there had ever seen, would not allow his relation to view such a pair; for, when they were so near, they might touch, and that in the presence of the mate Paturzo. There might be those who believed all this; he could not account for the belief of some; but if there were not another thing to be objected to Gargiulo and his mate, this was sufficient to prove that their testimony was not true. This was all invented, or a fabricated and gross falsehood. The captain meant to improve the case, to take in cautious minds; perhaps to increase his claim to enlarge the uncertainties, which with royalty were greater than certainties; to improve his chance of obtaining the £1,300 for which he had come over to this country. But one more statement of this witness he would mention, and then he should be done. He held up these witnesses as models of perfect art, as well-finished examples of their kind, as the best paid, and altogether such as ought to be esteemed very crack specimens, displaying zeal in proportion to the much they had received, and the more they expected. But happily there were limits to this art, as to all human arts; and if there were not, God pity the innocent against whom this mighty art might be directed.

Brougham did not neglect to take what advantage he could of prejudice against Buonaparte (who was still living at St. Helena) and the French. The witness Sacchi had once been a soldier in his army.

In referring to the evidence of Sacchi, there was one very pleasing symptom well deserving notice: it was connected with the reception it had obtained, and to the mode in which a false estimation had been endeavoured to be given to it. It showed how the age was improving—how it was rising above the vulgar prejudices of a few years ago, against the French and their leader. He remembered the day when few persons would have ventured to bring forward a principal witness in any case, much less in one of this delicate nature, who had been a soldier of Buonaparte, who had served during many campaigns with him, and who had been promoted by that Corsican usurper—that revolutionary adventurer—that tyrannical chief: then a French hussar would have almost been

considered another name for every thing that was profligate and abandoned. However, against the queen of England he was thought a witness good enough; and, coming to England, he took upon himself the character of a gentleman: and he that had been once a common soldier in the French army, and afterwards a courier in the service of the queen, was brought forward as a person on whose testimony the utmost reliance might be reposed.

This witness had sworn to seeing the Queen and Bergami reposing in a most indecent situation in a carriage. It will be noted that in discussing this piece of evidence Brougham, while taking credit for saying nothing, does in fact say everything:

He was now saying nothing of the physical impossibility of the thing, at a time when the carriage was travelling at the rate of nine or ten miles an hour, over such roads as are found in that part of Italy, with their hands placed across each other, while the parties were both fast asleep, and, of course, without any power over their limbs. To overcome this difficulty would require the evidence of philosophers, who had witnessed an experiment so new and so strange.

Other witnesses did not come off much better in this speech. This is what Brougham said of two unhappy witnesses from Trieste:

Did their lordships recollect the waiter from Trieste, Cuchi? But they could not forget his aspect, if they had his name. Did they not recollect that physiognomy—the never-to-be-forgotten expression of that face—those eyes—that nose—that lecherous mouth, with which the wretch stood there to repeat the falsehoods, the wicked suggestions of his own filthy imagination, to which he had sworn at Milan? Would they not for ever remember that hoary pander from Trieste—the manner in which he told his story; the haggard look which gave him the appearance of an inhabitant of the infernal regions, and which must have reminded their lordships of the great Italian poet's description of a broad-faced tailor in hell peeping and grinning through the eye of a needle?

Another witness was compared with the detestable Iachimo in Shakespeare's *Cymbeline*, who likewise came from Italy to concoct evidence of adultery against a British princess.

Brougham concluded his address in the middle of the second day. The peroration, a magnificent example of emotive speaking, was so effective that one peer rushed from the house in tears.

My lords, I call upon you to pause. You stand on the brink of a precipice. If your judgment shall go out against your Queen, it will be the only act that ever went out without effecting its purpose; it will return to you upon your own heads. Save the country—save yourselves. Rescue the country; save the people, of whom you are the ornaments; but, severed from whom, you can no more live than the blossom that is severed from the root and tree on which it grows. Save the country, therefore, that you may continue to adorn it—save the crown, which is threatened with irreparable injury—save the aristocracy, which is surrounded with danger—save the altar, which is no longer safe when its kindred throne is shaken. You see that when the church and the throne would allow of no church solemnity in behalf of the Queen, the heart-felt prayers of the people rose to Heaven for her protection. I pray Heaven for her; and I here pour forth my fervent supplications at the throne of mercy, that mercies may descend on the people of this country richer than their rulers have deserved, and that your hearts may be turned to justice.

The rest of the proceedings are for the most part of less interest and must be more briefly described. At the end of Brougham's speech most people felt that the prosecution had failed to prove a case. The witnesses had been specific in their allegations and had not often been led into contradictions, but they were all foreigners, and many peers felt that their evidence had been purchased. Much satisfaction was accordingly felt by the Queen's supporters at a passage in Brougham's speech in which, while scorning the evidence of the Italians, he promised to call for the defence two British naval officers, Lieutenant Hownam and Lieutenant Flinn, who had accompanied the Princess on the polacre. On this vessel a tent had been erected over one of the hatchways so that the Princess could rest there during the day and sleep during the night. There were two beds under the tent, and it was the contention of

the prosecution that Bergami had habitually slept in one of them. The evidence on this point, though not absolutely unequivocal, and though rendered suspect by the character of the Italian witnesses who gave it, was damaging enough, and it was hoped by the defence that if it could be clearly controverted by the British officers the case would be almost at an end. The prosecution, too, as the days went on, were more and more clearly obliged to abandon most of the Italian evidence and to rest their case on the happenings aboard ship. The testimony of the two officers was accordingly awaited with intense interest by both sides. It proved to be exceedingly damaging to Caroline; so much so that one observer said it did her cause more harm than all the evidence furnished by the other side. Lieutenant Flinn, the first of the two officers, fainted away under cross-examination by the Solicitor-General and had to be carried unconscious from the house. All he could say about Bergami's whereabouts at night was that he, the lieutenant, did not know where he slept and had never seen him in the tent at night; but since at night the tent was closely fastened and could be entered only from below, this proved nothing. His spectacular collapse under cross-examination was brought about by questions on a minor matter. He held in his hand a paper from which he refreshed his memory of the dates of the voyage. This proved to be a copy of notes that he had taken at the time—or more exactly a copy of a copy—and he became utterly confused over the circumstances in which the copies had been made, and even over the language in which they had been written. As the attendants carried him out in a state of insensibility, it was clear enough that he had done nothing to advance the cause of the Queen.

The evidence of Lieutenant Hownam was still less favorable to her interests. Though he had never seen Bergami under the tent at night, he admitted that he did not know where else he slept and that he believed he did sleep there. This evidence had great effect on opinion in London. Greville, who a week before had written, "Nobody has any doubt that it will finish by the Bill being thrown out and the Ministers turned out," now said:

Until the evidence of Lieutenant Hownam it was generally thought that proofs of her guilt were wanting, but since his admission that Bergami slept under the tent with her all unprejudiced men seem to think the adultery sufficiently proved. The strenuous opposers of the Bill, however, by no means allow this, and make a mighty difference between sleeping dressed under a tent and being shut up at night in a room together, which the supporters of the Bill contend would have been quite or nearly the same thing. The Duke of Portland, who is perfectly impartial, and who has always been violently against the Bill, was so satisfied by Hownam's evidence that he told me that after that admission by him he thought all further proceedings useless, and that it was ridiculous to listen to any more evidence, as the fact was proved; that he should attend no longer to any evidence upon the subject. This view of the case will not, however, induce him to vote for the Bill, because he thinks that upon grounds of expediency it ought not to pass. The Ministers were elated in an extraordinary manner by this evidence of Hownam's.

An important advantage, however, was soon to be secured by the Queen's side. When Brougham desired that Rastelli should be recalled for further cross-examination, the prosecution were obliged, to their embarrassment, to admit that he had been sent to Italy as a messenger and that he was not available to the House. It was naturally alleged by the defence that he had been sent out of the country because the prosecution did not dare to expose him to further questions. At this time the defence had been able to prove that some at least of the Italian witnesses had been suborned by the Milan commission or their agents. Rastelli was supposed to have been active in this discreditable business, and it was for that reason that he was wanted at the bar. All that the prosecution could offer in reply was to admit a mistake. When John Powell, the government solicitor who had charge of the witnesses, was brought in to give evidence, Brougham rose in his place and cried: "My lords, I wish to ask the witness one question: 'Who is your client or employer in this case?'" There were loud cries of "Order!" as Brougham fearlessly maintained his right to press the point. It was a question whose answer—the King—everybody knew,

but that nobody was willing to utter. The general silence gave Brougham his opportunity to make the justly celebrated comparison between George IV and Milton's personification of Death in *Paradise Lost* (II, 666). "And who is the party?" asked Brougham. "I know nothing about this shrouded, this mysterious being—this retiring phantom—this uncertain shape—

If shape it might be call'd that shape had none
Distinguishable in member, joint, or limb,
Or substance might be call'd that shadow seem'd,
For each seemed either . . .

What seemed his head

The likeness of a KINGLY CROWN had on.'

The effect of this startling simile was enormous. First, no doubt, Brougham's hearers were struck by the neatness of the allusion to the kingly crown, and then perhaps they may have been amused by the description of their sovereign, so fat that he had to be squeezed into his corsets, in the line

If shape it might be call'd that shape had none.

They may then have reflected that the family relationships of Death in *Paradise Lost* were even less happy than those of the Hanoverian royal house. Death was the product of an incestuous union between Satan and his daughter Sin. Shortly after birth this unpleasant child pursued his mother and overtook her "in embraces forcible and foul," with consequences that may be learned from Milton's poem. It is not to be wondered at that this part of Brougham's remarks was omitted from most contemporary accounts of the trial.

The longest of all the speeches was made by Denman in summing up for the defence. It was much admired at the time, and parts of it are undoubtedly effective, but the speaker made an unfortunate blunder in a comparison between Caroline and Octavia, the wife of Nero:

The house had two other discarded servants, Sacchi and Rastelli, to establish the most disgraceful facts that ever polluted the lips of man, and which he (Mr. Denman) should have thought no husband of the slightest feeling would have permitted to have been given in evidence against his wife, even if she had forsaken his fond and affectionate embraces, much less if he had driven her into guilt by thrusting her from his dwelling; recollecting that the more depraved he showed his wife to be, the more he established his own cruelty and profligacy; and the more imputations he cast upon her, the more he was to be despised for having deserted and abandoned her. He had heard examples, supposed to be similar to the present, quoted from English history, but he knew of no example in any history of a Christian king who had thought himself at liberty to divorce his wife for any misconduct, when his own misconduct in the first instance was the occasion of her fall. He had, however, found in some degree a parallel in the history of imperial Rome, and it was the only case in the annals of any nation which appeared to bear a close resemblance to the present proceeding. Scarcely had Octavia become the wife of Nero, when almost on the day of marriage she became also the object of his disgust and aversion.

The parallel was a striking one, and was illustrated with quotations in Latin and Greek, but one of these quotations was thought by Denman's hearers to attribute to George IV a vice which in fact he did not possess. The insult, inadvertent though it may have been, was fiercely resented by the King, and the offender was never forgiven.

Denman's peroration was still less happy, since it came near to admitting the guilt of his client:

This is an inquiry, my lords, unprecedented in the history of the world: the down-sitting and up-rising of this illustrious lady have been sedulously and anxiously watched: she uttered no word that had not to pass through this severe ordeal. Her daily looks have been remarked, and scarcely even her thoughts escaped the unparalleled and disgraceful assiduity of her malignant enemies. It is an inquisition, also, of a most solemn kind. I know nothing in the whole race of human affairs, nothing in the whole view of

eternity, which can even remotely resemble it, but the great day when the secrets of all hearts shall be disclosed!

He who the sword of Heav'n will bear
Should be as holy as severe!

and if your lordships have been furnished with powers, which I might almost say scarcely Omniscience itself possesses, to arrive at the secrets of this female, you will think that it is your duty to imitate the justice, beneficence, and wisdom of that benignant Being, who, not in a case like this where innocence is manifest, but when guilt was detected and vice revealed, said—"If no accuser can come forward to condemn thee, neither do I condemn thee: go, and sin no more."

That the Queen should go, and sin no more—and above all, that she should go—was the unequivocal desire of George and his ministers, and some wit produced the following parody of this part of Denman's speech:

Most gracious Queen, we thee implore
To go away, and sin no more;
But, if that effort be too great,
To go away at any rate.

After speeches by the Attorney-General and Solicitor-General, the Lord Chancellor summed up much against the Queen, though he seemed inclined to throw over most of the Italian evidence, and to concentrate on a fact that seemed reasonably well established—that Bergami and the Queen had habitually slept under the same tent on board the polacre. After several speeches by members of the House, which was nominally sitting in a legislative and not in a judicial capacity, and which was therefore not confined by the ordinary rules of legal procedure, there was a division in which a hundred and eight votes were cast for the bill and ninety-nine against it. A majority of only nine being plainly insufficient to ensure its passage through the House of Commons, its promoters abandoned it among loud and vehement cheers. Outside the house

the news was received with prodigious rejoicing. London was illuminated for three nights in succession, and the Queen was carried in state to St. Paul's Cathedral to give thanks for her escape from persecution. But though nearly everyone agreed that she was a much-injured woman, and that her husband was not the man to complain of marital infidelity, there were few who felt able to maintain that she herself had not been at fault. It is pleasant to record that among those few was Brougham, who had done so much to save her. He told his intimates that he believed her to be *completely innocent*, and he offered to declare in the House of Commons, upon his honor as a gentleman, that this was his sincere belief.

The Queen did not long survive to enjoy her triumph, and even before she died her popularity had begun to flag. At the extraordinary scene before the side door of Westminster Abbey—the South Door near the Chapter House, that admits one directly to Poets' Corner—there were cries of derision as well as sounds of pity when the Queen sought admission in vain to her husband's coronation. That was on July 17, 1821. Within a few days she was taken ill at the theatre, and in less than a fortnight she was dead.

Tilton v. Beecher

CHAPTER VIII

IN 1874 Theodore Tilton, a well-known journalist of the time, sued his pastor, the Reverend Henry Ward Beecher, of the Plymouth Church, Brooklyn, for damages of a hundred thousand dollars. The charge was criminal conversation with Mrs. Tilton. Henry Beecher, then sixty-one years of age and at the height of his career as a preacher and writer, was possibly the most famous clergyman that this country has ever produced. It was therefore natural that the case should receive extraordinary public attention, and it has remained one of the most remarkable in the history of American jurisprudence. It is true that it did not contribute greatly to the reputation of any of the lawyers engaged in it (except perhaps to that of William Evarts), but to the student of legal language it is valuable as a perfect type of oratorical fashions that have since vanished from the bar. The principles of verbal persuasion are the same now as they were seventy years ago, but in the profuse records of the Tilton-Beecher trial we can study them in a setting unfamiliar to any but the oldest lawyers now practising in the courts. There is another reason why the case deserves our study. Before it came to trial, Henry Beecher signed what was alleged by his enemies to be a confession of his adultery with Mrs. Tilton. The document was produced in evidence, and its interpretation occupied for several days the verbal ingenuity of the lawyers on either side, furnishing a modern student with an instructive exercise in forensic exegesis.

The trial was the climax of a long and somewhat complicated story involving not only Beecher and Tilton, but also the other leading members of the congregation of the Brooklyn church of which Henry Beecher was pastor. He was a member of a famous family, and his early history was well known to his flock. His father and all his brothers were clergymen; Harriet Beecher Stowe was one of his sisters. At the close of an unpromising boyhood he underwent religious conversion and, after graduating from Amherst, became a preacher. He married at twenty-four, went to the West, and began to make a reputation for himself as a clergyman in Cincinnati and Indianapolis. In 1847 he was summoned to the newly formed Plymouth Congregational Church at Brooklyn. In this ministry he was an overwhelming success. He became the most popular preacher in America—perhaps even in the whole Protestant world—and was in immense demand as a lecturer. For years he edited a religious weekly—*The Independent*—whose proprietor, Henry C. Bowen, had founded Plymouth Church and called Beecher to Brooklyn, and throughout his life his income from articles and books enabled him to double his ministerial salary, which at the time of the trial was twenty thousand dollars a year. His reputation became international when he visited England at the time of the Civil War to make a series of speeches in favor of the Northern cause. In the rough Lancashire cotton towns at that time feeling ran strong for the Confederacy, and Beecher's tour was a brave one: his lawyers made the most of it at the trial. By 1870 he had become so famous that every visitor to New York hoped to hear the great preacher, and his weekly congregation at Plymouth Church numbered between two and three thousand people.

Among them were Theodore Tilton and his wife Elizabeth. Tilton was a young protégé of Beecher's whom he had persuaded Bowen to install as his successor when he found an editor's work took too much of his time. The young man became a brilliant journalist whose work was known throughout the country, and he had not been without his share in nourishing the reputation of his

friend and pastor. Beecher was on affectionate terms with husband and wife, and a frequent visitor at their house on Livingston Street.

Trouble in the Tilton household seems to have begun in 1870. That summer Mrs. Tilton is alleged to have confessed to her husband that she had been guilty of undue familiarity with Henry Beecher. Whether this familiarity amounted to adultery or merely to improper solicitation on the part of the clergyman, or indeed whether it took place at all, cannot be known with certainty: Henry Beecher denied that any undue familiarity or improper solicitation on his part took place at any time. From July 1870 Tilton ceased to attend Plymouth Church, and he began to take counsel with Francis D. Moulton, a prominent member of the congregation and a friend of both Tilton and Beecher. The situation was complicated by difficulties between Tilton and his employer, Henry C. Bowen. The causes of friction between them seem to have been two. First, Tilton had written articles in Bowen's paper, of which he was editor, that seemed to hint at approval of free love, or at least seemed to favor a loosening of the laws and customs governing marriage. These articles had caused some protest, and Bowen feared that they would injure the circulation of the paper. Second, Bowen had told Tilton scandalous stories about Beecher's supposedly immoral life. Tilton had repeated some of this scandal to Beecher, and the fact had become known to Bowen. On the subject of Tilton's religious and moral opinions and their effect on the prosperity of the papers under Bowen's control, Bowen consulted Beecher, and as a result of the advice that he received Bowen later discharged Tilton from his post as editor. As the end of the year approached, all three men were on bad terms with one another, and on December 30, 1870, Tilton sent Moulton to Beecher's house with a message that precipitated a crisis.

In the message that Moulton carried, Tilton asked Beecher to come to his house for an interview. According to his own account, Tilton in this interview accused Beecher of committing adultery with his wife; according to Beecher, the charge was improper solicitation. Moulton was not present, but his account of other con-

versations that he had with Tilton and Beecher supported Tilton's side of the story. Later the same day, Beecher visited Mrs. Tilton and obtained a retraction from her in writing. It read as follows:

Wearied with importunity and weakened by sickness, I gave a letter inculcating my friend Henry Ward Beecher, under assurances that it would remove all difficulties between me and my husband. That letter I now revoke. I was persuaded to it—almost forced—when I was in a weakened state of mind. I regret it, and recall all its statements.

E. R. Tilton

I desire to say explicitly, Mr. Beecher has never offered any improper solicitations, but has always treated me in a manner becoming a Christian and a gentleman.

Elizabeth R. Tilton

It did not take long for Tilton to discover that his wife had provided Beecher with this retraction, and on the last day of the year—the day after his interview with Beecher—his anger was exacerbated by a letter of dismissal that he received from Bowen. On New Year's Day he accordingly sent Moulton on a second visit to Beecher, and on this occasion Moulton took a pistol with him. It was in the pocket of his overcoat, and he allowed Beecher to see it as he told him that Mrs. Tilton's retraction would not save him and that he must sign a confession that could be shown to Tilton. According to Moulton, Beecher said that his intercourse with Elizabeth was natural—an expression of his love for her—and added, "When to me there should now come honor and rest, I find myself upon the brink of a moral Niagara, with no power to save myself, and I call upon you to save me." Beecher denied saying anything of the sort, but he did put his name to a document which was later to be called the "letter of contrition" and which was exhaustively analysed at the trial. At the same time he surrendered Mrs. Tilton's retraction to Moulton's custody.

In the following week the three men met at Moulton's house, and though Tilton was not cordial to Beecher, he told him that in

order to spare the Tilton children he would agree to maintain silence. At about the same time there took place another incident that was to be a matter of sharp controversy later on. Bessie Turner, a servant-girl in the Tilton household, was sent away to boarding-school in Ohio. Beecher paid her school bills, and the Tilton party alleged that she was got out of the way because she had witnessed familiarities between Beecher and her mistress and had shown a disposition to talk about them. The Beecher party maintained that Beecher paid her bills out of kindness, just as he paid many other expenses that should have fallen on Tilton, and that she was sent away because her master persisted in making attempts on her virtue.

Between these events and the opening of the trial passed four years that were full of uneasiness for both parties to the dispute. It seems that Tilton's promise to protect Beecher's reputation was broken within the year, and that he himself circulated rumors that the clergyman habitually led an immoral life. Bowen spread scandal of the same kind. As a result of complaints by Beecher, the three men met in April 1872 and signed a remarkable paper later to be known as the "tripartite agreement." In this document Bowen and Tilton withdrew, and promised not to repeat, any charges against Beecher, who in his turn agreed "to put the past forever out of sight and out of memory." At the time of the trial this agreement was the object of sarcastic comment in the newspapers. *The Nation*, for instance, wrote:

There is, perhaps, nothing in the case more comic—and there is a vein of broad comedy running all through it—than the position assigned to this instrument and the terms in which it is spoken of. The paper contains a silly, but in form solemn, agreement between three grown men not to spread dirty stories about each other, and is, in matter and manner, in all respects worthy of three big school-boys or girls who were not kept closely enough to their studies.

But the agreement, supposing the three parties to have been sincere in their protestations, might conceivably have brought the

scandal to an end had it not been for the intervention of a fourth party who was determined to keep it in existence and if possible to bring it to a head. This fourth party was Mrs. Victoria Woodhull, nee Claflin, the advocate of women's suffrage and of free love.

Mrs. Woodhull and her sister Tennessee Claflin—widely known as Tennie C.—were among the most extraordinary characters in the public life of the time. As girls they had been occupied in the show business, traveling from one county fair to another telling fortunes and selling an Elixir of Life. (In the course of the trial it was stated that Victoria claimed to have raised a child from the dead.) The sisters had then settled in New York, and with the help of the elder Cornelius Vanderbilt had made a fortune in railroad stock. In 1870 they were running a weekly paper, *Woodhull and Claflin's Weekly*, devoted to the advocacy of socialism and free love, and to the election of Victoria Woodhull as President of the United States.

Victoria was a friend of Tilton's, and was supposed to have influenced him in the production of the objectionable articles in his paper; it was also alleged that for some time the two had carried on a liaison. But she would probably not have interfered in his dispute with Beecher had not Beecher offended her by refusing to support her on the platform, where she was an energetic and effective speaker, and had not his sister, Harriet Beecher Stowe, attacked her in the newspapers. With Henry's reputation so vulnerable to public comment, this was an imprudent act. Prudence, however, was not one of the many virtues of the authoress of *Uncle Tom's Cabin*. She was still in the midst of the violent controversy caused by her article in *The Atlantic Monthly* for September 1869, in which she had revealed Lady Byron's statement (made to her in confidence) that she had left her husband Lord Byron in 1816 because of his relations with his half-sister Augusta Leigh. Burning to revenge herself on the Beecher family, and making use of scandal which in 1872 was widely known in Brooklyn and New York, Mrs. Woodhull attempted to publish her story in one of the metropolitan newspapers, where it would re-

ceive the greatest publicity and do the most harm to her enemy. The newspaper offices all refused it, but Mrs. Woodhull was not easily defeated. In an address to the American Association of Spiritualists at Boston on September 11, 1872, she recited the whole Beecher-Tilton scandal, embellished with decorations of her own devising, and when her speech failed to receive adequate reports in the newspapers she published a written account of the scandal in *Woodhull and Claflin's Weekly* for November 2, 1872. At this the U.S. District Attorney took action. He was General Tracy, who was to be one of Beecher's principal counsel at the trial. On a charge of sending obscene matter through the mails, Mrs. Woodhull and her sister were put in prison, and remained there for six months before they were acquitted and set free.

With the scandal now open to public discussion it became impossible for Beecher and his supporters to halt the course of events. On May 30, 1873, the Tripartite Agreement was published in the newspapers. Its publication greatly annoyed Tilton because the language of the document led people to suppose that Beecher was forgiving Bowen and Tilton for some offence that *they* had committed against *him*. On the next day Beecher resigned from Plymouth Church in the following terms:

I tender herewith my resignation of Plymouth Church. I have stood among you in sorrow for two years in order to save from shame a certain household; but since a recent publication makes this no longer possible, I now resign my ministry and retire to private life.

In June of the following year Tilton published a statement accusing Beecher of an offence against him, but he did not name the offence. On this, Beecher asked that a committee of Plymouth Church should investigate the charges. The Committee of Investigation had six members, all appointed by Beecher, and after hearing the whole of the available evidence and examining thirty-six witnesses it reported that "it found nothing whatever in the evidence that should impair the perfect confidence of Plymouth

Church or the world in the Christian character and integrity of Henry Ward Beecher." In July 1874 Mrs. Tilton left her husband on Henry Beecher's advice, which he gave her after consulting his own wife. Mrs. Tilton went to live with Edward J. Ovington and Mrs. Ovington, and never rejoined her husband. On August 19, 1874, Tilton took out his summons.

The trial began on January 11, 1875, before Judge Neilson in the City Court of Brooklyn. The jury was not discharged until July 2, nearly six months later, and in the intervening hundred and twelve days of court-sitting a hundred and eleven witnesses were examined. In the early part of the trial the lawyers were sometimes delayed by ice in the East River (Brooklyn Bridge had not been completed, and they came by ferry); before the trial was at an end the court sometimes had to adjourn early in the day because of the stifling heat. The report of the proceedings runs to two and a half million words, and fills three thousand-page volumes closely printed in double columns of 7-point type. The lawyers on both sides were the most eminent of the day; five appeared for Tilton, and no less than six for Beecher. They made speeches of fantastic length and more than ordinary irrelevance, and as the case went on it became so unmanageably complicated that the lawyers themselves got lost in matters that they were supposed to be explaining to the jury. Of one of them, ex-Judge Porter, it is said in the official account of the trial: "He asked three questions when one would have served as well, and he did not seem to be master of the case." Anyone who reads his cross-examinations will probably consider this an understatement. Beecher's share of the expense came to \$118,000, and though \$100,000 of this was contributed by his friends in Plymouth Church he was never again a prosperous man.

Judge Neilson from time to time made efforts to restrain the gigantism of the case, but he was rarely successful. His impartiality was admitted by both sides. William A. Beach, the leading counsel for the plaintiff, appeared in all the most spectacular causes of the decade, and was an accomplished orator, being able, for hour after hour, to produce English prose of the most florid kind. He was,

however, intolerably prolix, and his summing-up for Tilton occupied ten days. Of his assistants, Samuel D. Morris was even more repetitive, and was given to a kind of exhaustive redundancy that must have been trying to the patience of his audience. Here is the peroration of Morris's opening speech for Tilton:

Oh, gentlemen, you who have children, you who know what it is to return from your daily labors to the bosom of your happy family, can appreciate the wrong and the suffering that my unhappy client has endured; but it is to you, as fathers, and as brothers, and as husbands, that we come with our case, and as you love your homes, as you love your families and your children, as you regard the sacredness of your homes and as you reverence virtue and respect the sanctity of the family altar, I call upon you in the name of all that has been violated, I call upon you in the name of Christianity by the teachings of the Saviour upon the Mount, by the law thundered from Mount Sinai, by every consideration that is near and dear to us on earth, I call upon you to brand the seducer as his crime deserves to be branded.

Let it be written throughout the land: "Death, destruction to the seducer"; and when you have rendered that verdict you will receive the prayers and the blessings of every virtuous mother and of every virtuous daughter in the land, and a peaceful conscience will follow you through life, will be with you in the last solemn scenes of earth, and console you when at last you stand with your life record before the ever-living God. (Applause).

Here we may note such repetitive items as *children, happy family; wrong and suffering; fathers, brothers, husbands; homes, families, children; virtue, sanctity of the family altar; I call upon you . . . I call upon you . . . I call upon you; near and dear; the prayers and the blessings; every virtuous mother and every virtuous daughter*. Ex-Judge Porter, one of the subsidiary lawyers for the other side, used the same oratorical device to such an irrational degree as sometimes to sound as though he were attempting parody:

Gentlemen, there is in the heart of Henry Ward Beecher, there is in the heart of William A. Beach, there is in the heart of each of

you, there is in my heart, a feeling of tenderness and of chivalry toward womanhood which makes it painful for us at any time, without evidence, to cast unmerited, or even merited, reproach on one of the sex of our mother, our wife, our sister, our child.

This specimen might have been modeled on the speech of the Attorney-General in the third chapter of *A Tale of Two Cities*:

That, the lofty example of this immaculate and unimpeachable witness for the Crown, to refer to whom however unworthily was an honour, had communicated itself to the prisoner's servant, and had engendered in him a holy determination to examine his master's table-drawers and pockets, and secrete his papers. That, he (Mr. Attorney-General) was prepared to hear some disparagement attempted of this admirable servant; but that, in a general way, he preferred him to his (Mr. Attorney-General's) brothers and sisters, and honoured him more than his (Mr. Attorney-General's) father and mother. . . . That, for these reasons, the jury, being a loyal jury (as he knew they were), and being a responsible jury (as *they* knew they were), must positively find the prisoner Guilty, and make an end of him, whether they liked it or not. That, they never could lay their heads upon their pillows; that, they never could tolerate the idea of their wives laying their heads upon their pillows; that, they never could endure the notion of their children laying their heads upon their pillows; in short, that there never more could be, for them or theirs, any laying of heads upon pillows at all, unless the prisoner's head was taken off.

On Beecher's side General Tracy proved himself a persuasive speaker, and his opening speech for his client, though conceived in the grandiloquent style of the time, contained some effective passages of which specimens will be given. He had attained his military rank in the Civil War, and had a long and distinguished career at the bar. After his retirement from private practice he became counsel for Venezuela in the boundary arbitration with Great Britain. William Evarts, Beecher's chief counsel, was probably the ablest of the eleven lawyers who took part in the trial, of which, alone among them, he never missed a single day. He had made his reputation in 1869, when he took the lead in the defence

of President Johnson on his impeachment by the House of Representatives. But like the other lawyers in this case, he had on this occasion little success in cross-examination. It was remarkable that though all the important witnesses on either side were exhaustively questioned for days on everything that could possibly bear on their testimony, and on much that could not, none of them was led into serious contradiction.

The lawyers gave much time and literary skill to the composition of character-sketches of the plaintiff, defendant, and principal witnesses. These sketches were so different in tendency (according to the side of the dispute from which they came) as to be unrecognisable as portraits of the same person. Each party accused the other of un-Christian behavior, and all the speakers drew on the Bible for metaphor and illustration. Mr. Morris, who was specially vehement in the religious line, said to the jury, "Upon the result of your verdict, to a very large extent, will depend the integrity of the Christian religion"—a somewhat startling hyperbole; and throughout the trial Beecher's lawyers made not very vague comparisons between their client and Jesus Christ, whose ordeal before Pontius Pilate was compared with Beecher's appearance before Judge Neilson. General Tracy, for example, in his opening said to the jury:

You cannot but feel, as I do, an overwhelming sense of the solemn importance of this trial. It will loom larger in history than any which has taken place for eighteen centuries. No man of this defendant's fame has ever been called upon to answer such a charge in a court of justice.

The emphasis which in this passage the orator presumably put on the word *man* must have helped to indicate the lightly hidden point of the allusion.

Comparisons with other figures of Christian history were explicit. Mr. Evarts said that Beecher reminded him of St. Paul on his visit to Malta, where he was bitten by a snake (the snake was Tilton). General Tracy likewise said of Beecher: "His motto has

been that of the great apostle he so much resembles, 'I know how to be abused, and I know how to abound.' " Mr. Evarts also likened Beecher to the house built upon the rock (Tilton was the house built on the sand), and gave the jury a long list of eminent divines who had been falsely accused of adultery, including St. Athanasius, St. Francis de Sales, Richard Hooker, John Wesley, and "the illustrious Fénelon, Archbishop of Cambray." Feeling some doubt (which was no more than reasonable) whether the jury's knowledge of ecclesiastical history was wide enough to cover the details of all these sad mistakes, Mr. Evarts went almost as fully into the case of every clerical victim of injustice as if it had been necessary to obtain a verdict on his behalf from the City Court of Brooklyn.

When Beecher's portrait came to be drawn by the lawyers for the other side, the result was different indeed. Mr. Beach referred to him as one "whose priestly robes were smeared with blasphemous lust," and compared him with King David in his relations with Uriah the Hittite. In case the jury should have forgotten the story, he read it to them from the Book of Samuel. As a counter to St. Athanasius, the illustrious Fénelon, and the other saintly names brought up by Mr. Evarts, Mr. Beach recited a long catalogue of clerical depravity mainly drawn from recent years in New England and New York, and furnished to him, he said, by "gentlemen interested in the subject of this examination."

Francis Moulton had a bad time at the hands of Beecher's lawyers. Tilton in the witness chair compared him to Sir Philip Sidney, but Tracy thought he was more like Judas Iscariot. The passage is an elaborate one and worth quoting in full as an example of legal invective:

But no mere words can do justice to this man; none but an artist, who should paint the man as he is, can bring out his real character before mankind; and, thank heaven, gentlemen, that portrait has been painted, and by one of the greatest artists the world has ever known. If any of you ever visit the beautiful city of Milan, you will find that, next to its magnificent cathedral on which thousands of saints and angels stand carved in heavenly

white, in the attitude of silent prayer, the pride and glory of that city is in the humble refectory of an ancient monastery, upon the wall of which, four hundred years ago, the illustrious Leonardo da Vinci painted his almost inspired picture of the "Last Supper"—a picture, the colors of which are too rapidly fading, but the fame of which will never die. And, gentlemen, in the most striking portrait of that group of disciples, you will recognize the startling likeness between the red matted hair, the sharp and angular face, the cold and remorseless eyes of Judas Iscariot, and the same features in his legitimate successor, the "mutual friend." (Laughter and applause). There, on that consecrated wall, the portrait of Francis D. Moulton has stood waiting for his birth four hundred years, and will stand for twice four hundred years after this resurrected Judas shall have sunk into eternal infamy.

It was such a man that Tilton requested to become his friend in this emergency, and it was this man into whose hands he placed the letter of his wife and bade him go and invite Mr. Beecher to an interview on the night of the 30th of December.

As to Tilton himself, Porter thought he was like Satan:

No fairer spirit shone in Heaven than the angel who is named today as the instigator of every crime in each indictment that you try when you send criminals to the State Prison.

Tracy was more elaborate on the same subject. The passage is an example of the force obtainable by the use of a specific and concrete vehicle in metaphor:

At this very moment, if he could realize the sad truth that he is morally dead, he would still rejoice in this post-mortem investigation of his character. The decaying corpse would rather be dissected than buried; but we propose, gentlemen, to dissect him first in the interest of truth, and to bury him afterwards in the interest of decency; such, gentlemen, is the plaintiff in this cause. A staunch new vessel, launched upon an honorable voyage, sailing with prosperous winds over unruffled seas, has been transformed into a pirate by the wickedness of her commander, and wrecked by his folly, and now lies a stranded and battered hulk, the object at once of the curiosity and abhorrence of mankind.

Beecher and Tilton and their wives both attended the trial regularly. Mrs. Tilton's first appearance, which was on the second day of the proceedings, caused a sensation. She came into court in the company of Edward J. Ovington and his wife, with whom she had been living since the estrangement from her husband. She sat with the Plymouth Church party, who almost filled the courtroom, and who brought with them quantities of flowers. These flowers drew much hostile comment from the newspapers. One journalist wrote:

The public still continues to be troubled by the demeanor in court of the parties to the controversy. They seem to consider it a light, joyous affair, like a charade, when the rest of the world considers it a serious, horrible affair, like a tragedy. When Plymouth Church, too, filled the court-room with bouquets for some days at the beginning, the odor of them sickened the rest of the community. "Floral tributes," as they are called in the Brooklyn dialect, seemed, in such a place, on such an occasion, like wreaths round the man-hole of a sewer.

The Tilton party, urged by emulation, likewise began to supply flowers for the principals, and there is an amusing contemporary account of the embarrassment they caused to Theodore Tilton when they did so:

The court-room, or rather that part of it reserved for counsel, was fragrant with the odors of hot-house plants. The violet vied with the lily, and the chaste camelia was in contrast with the petals of the "red, red rose." . . .

Quite naturally, under the circumstances, when a magnificent and showy bouquet of roses, violets, lilies, and arbutus was brought to Mr. Tilton, it attracted the attention of the entire audience, counsel not excepted. The plaintiff blushed like an innocent school-boy as he detached the card attached to the floral tribute, and read the inscription, "To Theodore Tilton, with the compliments of his friends." Immediately afterward a hat-box was handed to Mr. Tilton, and removing the cover, he drew forth a bouquet, if anything more conspicuous than the first. By this time the counsel and the witness on the stand ceased to attract the attention of the specta-

tors, and Mr. Tilton and his group of counsel were under every eye. The plaintiff had scarcely deposited his gifts upon the table at which he was sitting, before two additional bouquets were passed over to him, the larger one being for ex-Judge Morris. Mr. Tilton's face turned crimson, and a smile ran round the court-room.

Mrs. Tilton did not make a favorable impression in court. She could not be a witness because the law prevented her from giving evidence either for or against her husband, and though she asked to be heard the judge refused her request. Neither side wished her to be called, each being afraid of what she might say in the witness chair. She spent the days in the courtroom chatting gaily with her friends, occasionally glancing timidly in the direction of her husband, who did not return her glances, but for the most part sat with his back to her and with his eyes fixed on the jury. A reporter wrote:

The crowd instinctively instituted a comparison between her and Mrs. Beecher, and the result was not favorable to Mrs. Tilton. It was apparent that they were opposite in character. On one side was a weak, timid, sentimental woman; on the other a positive, determined, and, even in her old age, a handsome woman. Mrs. Beecher was cool notwithstanding the bitter attacks upon her husband's honor. Mrs. Tilton was evidently nervous and embarrassed. Mrs. Beecher has a classical face, full of force and expression; Mrs. Tilton's face is of a commonplace type.

Beecher himself seems to have been a commanding figure at the trial, as he was everywhere. His personal appearance, which was majestic without the handicap of a pompous manner, had always been an important factor in his enormous success in the pulpit. Like all great preachers, Beecher was an accomplished actor who knew how to make the most of his personal advantages, and his demeanor at the trial probably went far to save him with the jury. Though his lawyers chose to refer to him as "this aged man" and "a man three score years of age," no doubt with the suggestion that so venerable a figure could not possibly be subject to lecherous

impulses, Beecher impressed everyone who saw him as a man of inexhaustible vitality. In the courtroom he showed a self-possession and a well-bred urbanity which were by no means universal there, and alone among the principals at the trial he kept a sense of proportion and a touch of humor. His attitude towards his difficulties is well illustrated by the answer that he gave to two of his lawyers who apologised for visiting him on business on a Sunday. "We have it on good authority," he said, "that it is legal to pull an ass out of a pit on the Sabbath day. Well, there never was a bigger ass, or a deeper pit."

The first important speech at the trial was Samuel Morris's opening for Tilton. In describing the horrible treachery of which he said Beecher had been guilty towards his client, Morris made ingenious use of an apparently irrelevant circumstance to supply him with a concrete object—it was a picture—on which he could fix the attention of the jury. The conception of the seducer's portrait looking down from the wall on the family that he had invaded is a noteworthy forensic device.

At the very time, as we shall show you as clear as the sun now shines, when the defendant was sitting to have his portrait painted to be hung up in the house of the plaintiff, he was carrying on this illicit intercourse, and before long—before that portrait was completed and ready to adorn the walls of the once happy home, that home had been debauched, that family had been destroyed. Where shall the portrait be hung? What wall shall it adorn?

When he came to Bessie Turner, the maid in the Tilton household who had been sent away at Beecher's expense, Morris gave full play to his tendency to repetition, determined that this point at least should not escape the jury. In the following sentences he refers eight times to the fact of her removal, and four times to the payment of her expenses by Beecher:

At this time, also, Bessie Turner, of whom you have heard, a young woman in the house of Mr. Tilton, had overheard conversations between Mr. and Mrs. Tilton with reference to this matter,

and it was deemed prudent that she should be gotten out of the way; it was not safe to have her here in Brooklyn: it was feared she might tattle, that she might talk, and thus the secret become known, and so she is sent to a boarding-school in Ohio and the expenses of her education are paid there by the defendant in this action. He contributes out of his own money the expenses of Bessie Turner when she is at school in Ohio, and we want them to explain, if they can, why Mr. Beecher paid the expenses of Bessie Turner at school in Ohio. We say, gentlemen, it was because she had overheard conversations, had become possessed of some facts, and there was fear of her tattling; it was dangerous to have her here. That is the reason that it was desired and desirable that she should be removed from this city, and she was sent to Ohio, the defendant paying her expenses.

The reader feels that this remarkably antiphonal passage would go well to music, with the sopranos chanting *Bessie Turner was sent to Ohio*, and the basses bellowing in reply *And the defendant paid her expenses*.

The first witness to give crucial testimony for Tilton was Francis Moulton. According to a reporter who was present, he made a poor impression:

There is a painful lack of earnestness in the man, if his bearing does him no injustice. When the gravity of the issue is considered, his replies to the most vital questions often seem flippant. He asserts that the greatest preacher in America confessed adultery to him, and his manner is that of a listless gentleman giving his verdict upon a novel brand of champagne. He talks and acts like a man who is slightly bored with the whole subject, his mustache concealing a sneer as if this scandal-tragedy after all, to "a man of the world," is a sort of low comedy or broad farce . . . He was asked to describe Mr. Beecher's manner, and replied, with a coarse sneer, "Oh, he wept as usual!"

But in spite of Moulton's failure to carry perfect conviction to the jury, he gave testimony highly damaging to Beecher of the interviews between Moulton, Beecher, and Tilton in December 1870 and January 1871. Nor was he much shaken in cross-examina-

tion. It was not until the defence got to work on the "letter of contrition" given to Moulton by Beecher on January 1, 1871, that the effect of Moulton's story could be seriously weakened.

Tilton's evidence did not prove to be decisive on either side. His alleged advocacy of "free love" gave the lawyers an opportunity for some entertaining demonstrations of bias. One called it simply "free lust"; another, "the opinions that assert greater freedom in the matter of marriage and its dissolution, and its maintenance only during continued attraction or affection." Tilton was a sensitive man who suffered from a lack of the fortitude that enabled Beecher to defend himself in public. When an article by Beecher in *The Christian Union* praising him as "a brilliant young writer and orator" was read in court, Tilton closed his eyes while the tears rolled down his cheeks.

The plaintiff's side had great difficulty in producing any direct evidence of the supposed acts of adultery between Beecher and Mrs. Tilton. Had it not been for Beecher's alleged verbal admissions, and above all for the letter of contrition—in Moulton's handwriting—to which he had so rashly put his name, there would have been scarcely any case for him to answer. Tilton's lawyers did not fail to point out to the jury (as Iago once explained to Othello) that in cases of adultery the evidence of eyewitnesses is hard to come by. They did their best in this direction by producing persons who had seen Mr. Beecher sitting on the floor by Mrs. Tilton's chair, or who testified that Mr. Beecher's face looked suspiciously flushed when he was surprised alone with the lady, but even in Brooklyn in 1875 such behavior was not considered conclusive evidence of criminal intercourse. Some of these witnesses provided comic relief: one maid, in particular, who said she had been in hospital suffering from *brownkeetoes*. On investigation this turned out to be *bronchitis*. The following passage in her cross-examination caused much amusement:

Now, about Motley's; do you remember being discharged from Motley's?

I do, Sir.

What was that for?

'Toxicated.

Anything else?

Nothing else as I know it, Sir.

Wasn't it in regard to lying also that you were sent off from there?

No, Sir.

Nothing of the kind?

Nothing of the kind.

Nothing but intoxication?

Nothing but 'toxicated. I told her I wasn't "tight," and I was "tight." (Laughter).

The same maid caused some confusion by claiming to be *the first witness*. No one could understand what she meant until it appeared that she had actually described herself as *the first wet nurse*.

The short biography of Beecher that General Tracy gave in his opening speech shows how a speaker can give poetical color to a prosaic subject—and suggest far more than he says—by using metaphors whose vehicles are simple pictures. We may regret the clichés in the following passages: the *fair fame*, the *bed of roses*, the *shadow of reproach*, the *wider sphere*. But we must admire the vigor and skill with which the portrait is drawn. Notice the sentence *he made the fires, and swept the floors and rang the bell*. At first hearing, these simple words seem merely to be telling us that Henry Beecher did his own chores when he was a preacher in the West. But the effectiveness of the sentence derives from the choice of examples, because (whether the hearer understands it

consciously or unconsciously) it is peculiarly a clergyman's task, in a metaphorical sense, to make fires and sweep floors and ultimately to ring the bell. He makes fires because he wants to kindle people's hearts, and to give people light, and perhaps to burn up rubbish. The fiery tongues that were seen on the apostles at Pentecost likewise help this metaphor. Clergymen sweep floors because they want both to make ready the way of the Lord and to clean people's souls. The parable of the seven devils who found a man's soul swept and garnished is also hinted at here. As for the bell, that is one of the oldest and most evocative ecclesiastical symbols (bell, book, and candle). Beecher rang the bell in his forest church to call his congregation to service, to make joyous their weddings, and to mark their deaths. Finally, to whatever profession we may belong, to *ring the bell* is to succeed.

Less far-reaching in their symbolism, but equally successful in their way, are *the cabin of the backwoodsman, the hut of the miner, the forecastle at sea*. Then there is the dexterous appeal to national feeling in *the cause of American union on the basis of American liberty*, heightened by the prejudice generated by the word *aristocracy* (and *foreign aristocracy* at that), and the picturesque exaggeration of *hand to hand fight*. The speaker, in the short quoted passage, most ingeniously contrives to combine the hostility aroused by foreigners with two other not easily reconciled elements: *aristocracy* (sure to be malignant but not likely to be numerous) and *the masses, or infuriated thousands* (numerous by definition but likely to be confused with a beneficent democracy unless described as *set on* by the wicked *aristocracy*).

The son of one of the most eminent clergymen of the last generation, a member of a large family of which all the men are clergymen and all the women authors of repute—a family, let me say, gentlemen, on whose fair fame the shadow of reproach has never rested hitherto—the defendant early devoted himself to the self-denying pursuit of a minister of the Gospel. For it was no bed of roses in a luxurious abode that he spread for himself—he made no use of a dominant family influence to secure the refinement

and privileges of a wealthy city parish. He struck boldly out into the wilds and hardships of the far West. He rode the rough circuit of a home missionary life. With his own hands he made the fires, and swept the floors and rang the bell in his forest church; with his own hands, assisted only by the faithful wife who stood by him then, and who—to the honor of womanhood—stands by him today, he ministered to the necessities of his forest home. When the thunders of his manly eloquence had reached even this distant coast and the imperative demand of the church had summoned him to a wider sphere of action, he left neither his simplicity nor his independence behind. He has been the same genuine, true-hearted, unaffected man here that he was in the West. . . .

It is then no wonder, that besides the power of his personal teaching, the demand for his printed sermons should be beyond all precedent; their weekly issue is read in every town and hamlet throughout this broad land; they are met with in the cabin of the backwoodsman, in the hut of the miner, in the forecastle at sea . . .

When danger threatened from abroad he was prompt to plead the cause of American union on the basis of American liberty in the face of infuriated thousands set on by a foreign aristocracy to revile him and to strike him down. Mr. Beecher's hand to hand fight with the English masses on English soil is a thrilling page in history, known and read of all men.

Later in Tracy's speech he offered the defence's theory of the lively regrets which, however the defence might seek to minimise them, Beecher had undoubtedly expressed in the letter of contrition. This theory, later confirmed by Beecher in the witness chair, was that he regretted having spoken evil of Tilton (and perhaps having lost him his position as editor); having believed scandalous stories about him; and having unintentionally won the guilty love of Mrs. Tilton, who, said Beecher, had, to his horror, revealed her passion for him. Tracy then went on to an elaborate examination of the letter of contrition, which, he said, was not dictated (as Moulton had sworn that it was), but consisted of "hasty reports of hasty expressions, spread over a long conversation, at intervals, and eagerly grasped at by a man who was anxious to record the worst

language which he could possibly select from the excited utterances of a man under deep feeling." Tracy placed the original paper in the hands of the jury, and pointed out to them, with great effect, the differences between the manuscript and the version published by the plaintiff. This version was as follows:

Brooklyn, January 1, 1871

In trust with F. D. Moulton

My dear friend Moulton:

I ask through you Theodore Tilton's forgiveness, and I humble myself before him as I do before my God. He would have been a better man in my circumstances than I have been. I can ask nothing except that he will remember all the other hearts that would ache. I will not plead for myself; I even wish that I were dead. But others must live and suffer. I will die before anyone but myself shall be inculpated. All my thoughts are running towards my friends, toward the poor child lying there and praying with her folded hands. She is guiltless, sinned against, bearing the transgressions of another. Her forgiveness I have. I humbly pray to God that he may put it in the heart of her husband to forgive me. I have trusted this to Moulton in confidence.

H. W. Beecher

Counsel asked the jury how they could believe that Beecher dictated to Moulton a letter addressed to Moulton. "It is the first instance, probably, in all your observation and experience of any human being writing a letter to himself." The letter, Tracy said, had no beginning, middle, and end, was absolutely without logical sequence, and violated the most familiar rules of composition. Beecher had never started any other letter to Moulton in the form *My dear friend Moulton*. There was no conclusion such as *Yours truly*, and *In trust with F. D. Moulton* meant the same as *I have trusted this to Moulton in confidence*. In the original the first period came nearly halfway down the letter, after *for myself*, and these two words were inserted between the lines. "Neither Mr. Moulton nor Mr. Tilton has ever ventured to print that sentence in type as

it was originally written." There was a comma after the first *God*, and a dash after *been*. "No one but a maniac could have deliberately uttered such a sentence." The next one began *I can't ask nothing*, "clearly showing that he did not write this from dictation," but the *t* in *can't* had been blotted; by Tilton, the defence suggested. The sentence *All my thoughts . . .* began with a small *a*; there was no comma after *friends*; there was a semicolon after *hands*, but the next word began with a capital; there was no period after *another*. This lack of ordinary facility in composition, said Tracy, was incredible in a letter dictated by a man well known as one of the most fluent writers of the day.

Tracy's next task was to weaken the expressions of regret to be found in this and other less incriminating papers written by Beecher. He did so by quoting a letter from Mrs. Tilton to her husband written in January 1868, *before* any accusation of adultery:

My Dear Husband:

I have just returned from Mattie's. Have the bust. Love it, etc. Oh, Theodore, darling! I am haunted day and night by the remorse of knowing that because of my harshness and indifference to you, you were driven to despair, and perhaps sin, and these last years of unhappiness.

There is the word *remorse*, used in connection with harshness, merely, harsh words, harsh language, and yet they say that the word *remorse*, in Mr. Beecher's letter, means adultery, cannot mean anything else than adultery, for what could a man have remorse for except for the crime of adultery?

I sometimes feel it to be the unpardonable sin.

Suppose this letter had been written by Mrs. Tilton after the alleged act—crime—how the changes would be rung on that phrase. How my eloquent friend would expatiate on that sentence, and he would ask you what is the unpardonable sin of the wife; what is it but adultery; what can it be but adultery. And yet the sin of which she is here speaking is the sin of harshness to her husband, uncharitableness, and ill temper.

And God cannot forgive me, but you only may be restored to your former loveliness. I shall be content to live my life in penance, yea, in disgrace. I am the chief of sinners. I understand perfectly how you have felt. I carry in my soul this burden black of sin.

Is there any such language in Mr. Beecher's letters?

When he came to Bessie Turner, Tracy said that she had been sent away to Ohio because her master, Theodore Tilton, had tried to corrupt her and wanted her tongue out of the way. He produced a written denial by Bessie that was almost more damaging than an admission would have been. It ran as follows:

The story that Mr. Tilton once lifted me from my bed, and carried me, screaming, into his own, and attempted to violate my person, is a wicked lie.

Yours truly,
Bessie

Beecher had paid Bessie's expenses in Ohio, Tracy said, because Moulton had suggested that he should do so on the grounds that Tilton could not afford them.

The peroration of Tracy's opening speech, though in a more florid style than is fashionable today, is a fine example of metaphors based on specific images suited to the topic. Note *the cup*, *the thorn-crown*, *the cross*, *the sepulcher*, and the suggested parallel between *the Divine Sufferer* and General Tracy's client, a parallel of which a preliminary hint is given in the first sentence quoted below:

This fair city will yet boast among her proudest monuments the statue * of him who conferred upon her such glory, and received within her gates such torture. . . .

* The factual part of this prophecy turned out to be true: there is a statue of Henry Ward Beecher in the fair city of Brooklyn.

What you do here will never die. When these scenes shall have passed away, when he who presides over this trial shall rest in the silent chambers of the dead; when the seats you occupy shall be filled by your children, or your children's children, strangers from distant climes will come to view the place from which was given back to the world, free from cloud or passing shadow, the name of Henry Ward Beecher. Even when centuries shall have rolled away, when these marble walls shall have crumbled and decayed, this trial will be remembered with all-absorbing interest. . . . Heroes are admired; it is the martyrs who are beloved. Not the triumphal procession and the loud hosanna, but the cup, the thorn-crown, the cross, the sepulcher conquered the world, and since the hour of the Divine Sufferer no follower of Christ has borne the cross in vain.

Beecher then took the witness chair, holding in his hand "a small bouquet of delicate flowers," and bowing low to the judge. In his examination he confirmed his lawyers' account of the circumstances in which the letter of contrition had been written. He swore that he had not dictated it and that he had signed it only after protest and when Moulton had said that it would carry no weight with Tilton unless he did. Adultery, said Beecher, had never been charged—only improper solicitation—and the letter in which Mrs. Tilton had confessed adultery to her husband was "the hallucination of a woman laboring under a monomania." This, said Beecher, had been the opinion of Moulton and Tilton as well as of himself. He also swore that until the first bills arrived he knew nothing about a suggestion that he should pay for Bessie Turner's schooling. He never kept accounts of the way in which he spent his income.

Beecher's cross-examination produced little result, and no further evidence of moment was heard. In summing up for the defence, Porter took five days and Evarts eight. Porter said of the plaintiff and his friends: "They come here in substance imputing black and beastly guilt to an aged and honored clergyman and a feeble but unstained matron." Shortly afterwards he called Mrs. Tilton "this white-souled saint," and, achieving for once a pic-

turesque phrase, said of Beecher in his Western days: "Going from log-cabin to log-cabin, he left nowhere the trail of the seducer." If Tracy had been too intellectual for the jury, Porter was determined that the simpler emotions should not be neglected. This is what he made of an early letter from Mrs. Tilton to her husband, which she had dated *Nursery, Sunday Eve, March 8, 1868*:

"Nursery." Ah! what is there to a woman's heart that is so near as the nursery, in which she exercises her ministrations of love to the children of marriage, and not of lust. "Nursery, Sunday Eve." And if there ever be a time when a mother speaks from her inmost heart, it is not merely from such a place, but on the eve of that Sabbath day which too many of us ignore, but which the lives and the children whom we love cherish as the hour that brings them nearest to God. It is not in letters written by the side of the cradle and on the evening of the Sabbath day, that mothers loyal to their husbands—and especially when they write not for newspapers, but write to those to whom they have pledged their unalterable love in time and in eternity—utter false sentiments.

From the subject of the Tilton marriage the egregious Porter went on to make the following remarkable reference to the judge on the bench. There seems unfortunately to be no contemporary account of Judge Neilson's demeanor during this part of Porter's speech.

Husband and wife you know, gentlemen, never grow old to each other. We see upon one whom we all honor and love (turning to Judge Neilson) the marks of maturing years and advancing age. I have not the pleasure of knowing the lady who has been chosen as the light of his dwelling, but I know that she does not see him as I see him; she sees him in the health and flush of young manhood, with the glory of youth upon him, and to this hour, to this hour his age is that on which he pressed upon her finger the marriage ring; and he, while he may be looking upon one whom time has touched with some of those changes which time leaves upon the faces of us all—he sees her as she came before the clergyman who solemnized their marriage rites, fresh and beaming, glowing with youth and bright as the morning star.

Porter was followed by Evarts. On the eighth and last day of Evarts' address the court sat for two and a half hours after the usual time of adjournment, and as he spoke the final words of his peroration he received enthusiastic applause which lasted for a full minute. Beach, who followed with his summing-up for Tilton, spoke for ten days. On the first day he paid the customary compliment to the superior oratorical ability of his opponents, and alluded to the *locus classicus* for such things—*Julius Caesar*:

If the eloquence and the oratory of counsel can move the conclusions of this jury, I have no hope of success before you, gentlemen. I am not an orator as Brutus is. I have no calumnies to utter; I have no epithets to apply. I have a plain, simple, logical argument to present to you upon the proof in this case.

The remainder of Mr. Beach's extremely long speech was remarkable chiefly for the variety and length of his literary quotations. He read to the jury long extracts from the Book of Samuel, the Psalms, Scott's *Woodstock*, Charles Reade's *Griffith Gaunt*, Byron's *The Giaour*, Hawthorne's *The Scarlet Letter*, Burns' *Epistle to a Young Man*, Scott's *Heart of Midlothian*, Josephus on *The Antiquities of the Jews*, and "the writings of Professor Wilkinson." Then came some legal exposition, of which the report says, "This part of the argument was illustrated with Scriptural citations and a reading of the hymn *Rock of Ages*." On the following day the jury, who must have felt that they were getting a free course in world literature, were regaled with readings from Macaulay on Francis Bacon. Then came Whittier's *Ichabod*, perhaps the most effective of Mr. Beach's quotations. With Henry Beecher sitting there in court and listening to them, the lines must have carried a sting. They express accurately enough the attitude towards him that the lawyer wished to arouse.

So fallen! so lost! the light withdrawn
Which once he wore!
The glory from his gray hairs gone
Forevermore!

Revile him not, the Tempter hath
A snare for all;
And pitying tears, not scorn and wrath,
Befit his fall!

Oh, dumb be passion's stormy rage,
When he who might
Have lighted up and led his age,
Falls back in night.

Scorn! would the angels laugh, to mark
A bright soul driven,
Fiend-goaded, down the endless dark,
From hope and heaven!

Let not the land once proud of him
Insult him now,
Nor brand with deeper shame his dim
Dishonored brow.

But let its humbled sons, instead,
From sea to lake,
A long lament, as for the dead,
In sadness make.

Of all we loved and honored, naught
Save power remains;
A fallen angel's pride of thought,
Still strong in chains.

All else is gone; from those great eyes
The soul has fled:
When faith is lost, when honor dies,
The man is dead!

Then pay the reverence of old days
To his dead fame;
Walk backward, with averted gaze,
And hide the shame!

The poem had been written in protest against Daniel Webster's speech in favor of a compromise on the slavery question. The circumstances were familiar to Beach's audience, and he concluded his address with the reading of an extract from Daniel Webster's works.

On the hundred and eleventh day of the trial the jury, who by then had been out for a week, sent a message to the judge that they could not agree. They were told to continue their deliberations. On the following day they were still unable to reach a verdict, and were discharged. The vote was nine for Beecher against three for Tilton; the nine Christians on one side and the three non-Christians on the other.

The Tilton-Beecher affair did not end with the disagreement of the jury. Though Beecher could scarcely look on the trial as a complete vindication, he found that his popularity as a preacher had not been destroyed. More than a year after the trial was over, a Congregational council met at Beecher's church in Brooklyn and issued a public statement: "We hold the pastor of this church, as we and all others are bound to hold him, innocent of the charges reported against him, until substantiated by proof." Years later, in 1883, the members of Plymouth Church held a great celebration of Beecher's seventieth birthday. Among the most conspicuous figures at that celebration was Judge Neilson.

In 1878 Mrs. Tilton, still separated from her husband, declared that his charges had been true, but she never returned to him. Tilton was ruined. He left this country in 1883 and traveled in Europe, later settling in Paris, where he lived on the small income which his literary work brought him, and passed the time by playing chess at the Café de la Régence. He died in 1907.

The Claflin sisters continued their extraordinary careers. In 1883 Mrs. Woodhull married John Martin, a member of an English banking family, and settled in England, where as an old lady she was well known for her good works. She died in 1927. Her sister Tennie likewise rose in the world, and became Lady Cook and Marchioness of Montserrat. The Claflin sisters perhaps gave

Anthony Trollope the idea for the Baroness Banmann, an American suffragist who figures in *Is He Popenjoy?*, published in 1878. The character is not one of his more successful creations, but the novel is a good one.

Were the charges against Beecher true? It is impossible to know. Mrs. Tilton admitted that they were, but then she had already done so once before and afterwards denied it. Those who were present in court and able to see and hear the witnesses were divided in their opinion, as was the jury. Most of the best-informed and least prejudiced observers seem to have believed that though the charges were probably true they had not been adequately proved.

The People against Carlyle Harris

CHAPTER IX

WHEN FRANCIS L. WELLMAN was Assistant District Attorney of New York, it fell to his lot in 1892 to prosecute Carlyle Harris, a young medical student, for the murder of his wife. The case, which was perhaps the most important of Mr. Wellman's long career at the bar, attained wide celebrity, and has many features of interest to a student of forensic English.

Carlyle Harris, who at the time of his trial was twenty-three years old, was the grandson of a well-known surgeon and had nearly completed his work at the College of Physicians and Surgeons in New York City. He was an able student and was expected to succeed in the competition for a hospital appointment. In the summer of 1889, while living with his mother at Ocean Grove, New Jersey, he met Miss Helen Potts, a charming and talented girl of eighteen. They became close friends, and when the two families returned to New York in the fall Carlyle Harris called frequently at the Potts apartment. Helen was by no means the first girl in whom Carlyle had taken more than a passing interest. It was proved at the trial that he was a habitual seducer of young women, and it is extremely probable that he attempted to persuade Helen Potts to yield to him. When she persistently declined to do so, he asked her mother to consent to an engagement. Mrs. Potts, however, told him that he was too young and that he would do better to wait until he was settled in his profession. But Carlyle Harris was not the man to be thwarted by a prudent mother.

On February 8, 1890, he called for Helen on the pretext of taking her to see the Stock Exchange, but instead of visiting the Exchange the couple went to the City Hall, where they were married by Alderman Rinckhoff under the assumed names of Charles Harris and Helen Neilson.

A few weeks after the secret marriage, which was revealed to nobody, Carl, as the Potts family called him, began to tire of his wife. His visits became less frequent, and Mrs. Potts noticed that Helen was often distressed by his neglect. He continued, however, to call at Ocean Grove when the family moved there for the summer, and it was with the idea of easing an awkward situation that Mrs. Potts invited a Miss Schofield, a friend of Helen's, to visit them. Some time before this Helen had told her husband that she was pregnant. Carl, who utterly refused any suggestion that the marriage should be made public, obtained her consent to an abortion, which he proposed to perform himself, but the girl, devoted to him as she was, insisted that before the operation was attempted some friend should be informed of her marriage. No doubt she had in mind the disgrace that would fall on her family if she died before the marriage was known. Her insistence on this precaution proves that even at that stage of her married life she had learned to distrust her husband's intentions.

One day early in June 1890 Miss Schofield was accordingly taken for a walk by Carl Harris on the beach at Ocean Grove. Helen stayed in the house on the plea that she had to finish a letter. When Miss Schofield learned the secret of the marriage she was indignant, and told Carl that she would beg Helen to confide in her mother. He replied, "You will do no such thing: I put you on your honor not to tell. My prospects will be utterly ruined if this marriage is known; I would rather kill her and kill myself than have the marriage public; I wish that she were dead and I were out of it." To this Miss Schofield replied, "Carl Harris, even in your anger you shall not say such things to me in my presence." Nothing more was said, and the two returned to the house. The same afternoon Carl and his wife went out on the beach, where among

the sand-dunes he attempted to perform an abortion on her, but desisted because he was frightened by the haemorrhage. Helen returned home pale and sick. It had already been arranged that she was to spend the following week on a visit to her uncle, a physician named Treverton, at Scranton, Pennsylvania, and it was the intention of Carl and Helen that if a baby should be born, it should be in her uncle's house.

Helen Potts was in poor health on her arrival in Scranton, and became increasingly unwell as her visit progressed. In less than a month she confessed her condition to her uncle. Dr. Treverton then wrote the following letter to Carlyle Harris. It was produced at the trial and earned the writer some severe animadversions from the leading counsel for the defence.

Scranton, Pa., July 29, 1890

Mr. C. W. Harris:

Dear Sir—As you are aware, Miss Potts is in a critical condition and you are all to blame. Things must be attended to at once, or you must know the result—disgrace for us all, and, above all, I shall need medical aid and money. Will you stand the bill? If you will, things can be made all right again and no one be any wiser. If not, we will take other steps. I shall be pleased to see you at Scranton at once to see to this matter. If you come, dispatch when you will be here and stop at the Wyoming House and I will meet you there. If you can't come, dispatch and say whether you will bear expenses. If you will, say yes; if not, say no, and may God help you to be quick about it and save any more trouble. Remember, I shall handle this thing to your sorrow if you fail to appear. Write to me, and don't fail to direct me what to do at once.

Yours truly,

Dr. Treverton

I mean business—

On receiving this repulsive communication, Harris traveled to Scranton, where he was met by Charles Olver, a cousin of Miss Potts, who welcomed him with at least a show of courtesy and spent two days in taking him on a tour of the sights of the neighbor-

hood while Dr. Treverton and another Scranton doctor worked over his cousin. After the two doctors had given her treatments designed to bring on delivery, a dead baby was born. It had been killed by injuries to the head that had been inflicted during the husband's attempt at abortion.

While this was going on Carl Harris became strangely communicative in his conversations with Charles Olver. On Sunday the two young men went through the Bellevue coal mines, and on Monday they visited the steel mills. On that day they did some drinking and missed the last trolley car back to Scranton, with the result that they had to walk; it was in the course of that walk that Harris made the dangerous confidences that were to be repeated against him at the trial. He said that he had had intercourse with a great many women and that only in two instances had he failed in his attempts at seduction, which he assisted by the administration of a strong dose of liquor disguised in ginger ale. With the two girls who had resisted this stratagem he had contracted secret marriages, but had since contrived to be rid of both, after having an abortion performed on one of them in the city of New York.

Helen Potts recovered from the birth of the dead child and remained in her uncle's house while he summoned her mother, who now learned for the first time of her daughter's secret marriage. Mrs. Potts was a woman whose morals were strict and even narrow; she was an assiduous lecturer to temperance societies and had never been inside a theater. She was naturally horrified by the news, and from this time on she continually urged Carl to go through a second marriage with her daughter before a minister. It was her insistence that the marriage must be made public that drove Carl to murder. The reasons for his extreme reluctance to make a public acknowledgement that Helen Potts was his wife have never been certainly known. He may have been married under an assumed name to some other woman. The district attorney's office made thorough and prolonged efforts to discover such a marriage, but without success. Or he may have feared that as a

man known to be married already he would be hampered in his career as a seducer. His operation on his wife had been a criminal act which no doubt he was likewise anxious to conceal, if only because it would prevent him from becoming a qualified doctor. Whatever the cause, he showed at all times a desperate eagerness to keep his marriage a secret, and a few hours after his unhappy wife had died he refused her mother's request that Helen should be buried as Mrs. Carlyle Harris. "You do not know what it means to me," he said, "if she should be buried under my name."

While Helen Potts was at Scranton, recovering from her illness, her husband was at Canandaigua, in the state of New York, where he registered under the name of Carl Graham at the Webster Hotel. He accompanied a young woman named Queen Drew who was visiting a Mr. and Mrs. Latham. Miss Drew explained to the Lathams that she had met Mr. Graham by chance on the railroad. He made himself agreeable to Mr. Latham, and boasted to him, just as he had boasted to Charles Olver, that he had no difficulty in getting his way with young women. "I have never yet failed," he said, "in any case I undertook." Mr. Latham was also somewhat shocked by a conversation between Carl Graham and Miss Drew, in which Carl feelingly complained of his poverty, and advised his companion to marry some old gentleman with lots of "mun." When Miss Drew seemed surprised at this proposal, Carl told her that they could get the old gentleman out of the way. "You find the old gentleman," he said, "and we will give him a pill; I can fix that." After these revelations of the character of his new friend Mr. Latham was perhaps not greatly astonished to find Carl in Miss Drew's bed in the middle of the night. On the following day Carl left for New York.

After about a month at Scranton Mrs. Potts and her daughter returned to Ocean Grove, where the mother continued to press Carl for a ministerial marriage. In October 1890 the two women met him by appointment in New York City. What followed can best be described in the words of Mr. Wellman's opening speech.

The mother immediately begins on the subject of the secret marriage, and he tells her to "Come down-town with him and he will show her that it is all right." So they leave Helen, and she whispers to her mother. "Mamma, if it is not legal, make it so." Mrs. Potts asks Harris to take her to the City Hall and he replies, "No; Mrs. Potts, why go to the City Hall? It is all right; but come to my lawyer's and my lawyer will explain it to you." She asks him, "Why a lawyer, Carl? Why have you employed a lawyer?" He assures her, "He will explain all this to you, and you will see that it is all right." So they go to the office of Mr. Charles Davison, one of the counsel in this case. Mrs. Potts tells Mr. Davison that she is not satisfied with the secret marriage or a marriage before an Alderman. She wants a religious marriage, a church marriage, and asks him to show her the certificate. Both men are silent. She says, "Show me the certificate of marriage. You say that you are married to my daughter. My daughter tells me she has given you the certificate to hold for her protection. Where is it? Show it to me." And Harris says, "I burned it." "What, burned it! My daughter says she gave it to you as her protection, and you have burned it?" "Yes, I have burned it, but you can get a copy." She says, "This is not as it should be; this is not a sacred marriage." And Harris, leaning back in his chair, exclaims, "Sacred! Well, I think not. The old man that married us is a liquor-saloon keeper; I have looked him up since the marriage." It was Alderman Rinckhoff who had married them. Mr. Davison, however, broke in at this time and said, "Let me send over to the Health Department and get you a copy." So he sent over and got a copy of the marriage certificate. When it was brought back it was seen to be under false names. This, of course, was not satisfactory to Mrs. Potts, and she said so in plain language to both of these men. Harris said, "I did it in that way for this reason: I thought that we might get tired of one another; and if we were married under false names we could some day drop the whole matter and nobody would be the wiser." Mrs. Potts exclaimed, "With my daughter! You were going to drop the whole matter, and nobody would be the wiser!" He said, "Well, it is as well for one as for the other if we should get tired of one another; we could try it, and if it didn't work, we could simply drop it and nobody would know it." Mrs. Potts said, "My brother-in-law has told me that you said to him that you had been married before, and Dr. Treverton told me that you said you had often been in such trouble as you were up there at Scranton; that you had had

five such abortions. I want to know what you mean by this?" He said, "Well, it wasn't true; I lied to Dr. Treverton." "Why lie to Dr. Treverton?" "Well, I lied, that is all; there wasn't a word of truth in it." Then Mr. Davison came to Mrs. Potts's rescue—for you see it was not a scene that any lawyer would wish to be a participator in—and he wrote out an affidavit and made Harris sign it. In this affidavit Harris stated that on the 8th of February, 1890, he had married Miss Potts under a false name; that his name on the list was Charles Harris, but his real name was Carlyle, and that hers, given as Helen Neilson, was really Helen Neilson Potts; that the false names on the records of the Health Department represented the true parties to the marriage. This affidavit and a copy of the marriage certificate were presented to Mrs. Potts and she was ushered out of the door.

Before Carl left the indignant mother he was able to persuade her to enter Helen as a boarder at the Comstock school in New York City, where, he said, she would be nicely educated. After the consent of Mrs. Potts had been obtained, he wrote a letter to Helen in which he urged her to agree. "For God's sake," he wrote, "do as I say in this matter, and go to that school." The girl obeyed him, and entered the school on December 2, 1890.

It was by now becoming plain, if not to the wife, at least to the mother, that Carl had tired of his bride. At the Comstock school he rarely visited her, and when he could not excuse himself entirely his visits were short. In the Christmas vacation he wrote to Mrs. Potts to say, "I have decided that nothing shall be said about this engagement." The use of the word *engagement* infuriated the mother, who wrote him an angry letter in which she said, "You are quite right; nothing shall be said about the engagement. You are married to my daughter. Why should you deceive your people and friends by talking of an engagement when you have signed an affidavit that you are my daughter's husband? You are quite right." A few days later he replied to Mrs. Potts: "I will do anything you say." Deceived by this assurance—Mrs. Potts never fully understood, during her daughter's lifetime, the character of the man she was dealing with—she wrote back, "I have received

your letter. You say that you will do anything that I say in this matter. Now, listen to what I say. The 8th of February will be the anniversary of your secret marriage. I set that day as the day on which you shall be married in a Christian way. You are to take your wife, and you are to be married before a minister; you are to take the certificate of marriage under your right names and indorsed by that minister, and send it to me and I will hold it, and whether I will make it known or not depends upon circumstances and upon your actions." On January 20 Carl replied to her letter. "All your wishes shall be complied with," he wrote, "provided no other way can be found of satisfying your scruples." The deadly connotation of the second half of this sentence did not dawn on Mrs. Potts until some time after her daughter had been buried. By that time the letter had been burned, but she perfectly remembered its terms, and was able to give them in evidence at the trial. As to Carl Harris, on the same day on which he wrote those words he visited Ewen McIntyre's pharmacy and asked the clerk to make up a prescription for which, he said, he could not wait until morning.

Helen Potts had been suffering from sick headaches, to which she had been subject for years, and had asked her husband, who, it will be remembered, was just completing his work as a medical student, whether he could prescribe something for them. It was this prescription that he now required. He made it out himself, signing it *C. W. H., Student*. It consisted of twenty-five grains of quinine and one grain of morphine, and was to be divided between six capsules. Two days later he gave his wife four of the six capsules in a cardboard box, with directions to take one every night. The remaining two capsules he kept back. He then took the steamer for Old Point Comfort in Virginia, and awaited events.

It was the contention of the prosecution that whereas three of the four capsules were comparatively harmless, the fourth was emptied by Harris and refilled with pure morphine in the amount of about five grains, a fatal dose. It is certain that Harris would have had no difficulty in supplying himself with any ordinary

quantity of the drug. Less than two weeks before, he had attended Dr. Peabody's lectures on *materia medica*, and at these lectures, on three successive days, bottles of morphine had been handed along the rows of students as they sat in the lecture theater, so that each man should be able to take as much as he wanted from the bottle. While he was at Old Point Comfort, Harris received a letter from his wife in which she told him that she had taken one of his pills without good results, and that the remedy was worse than the disease. He wrote to tell her to try another. She took a second and a third: only one remained in the box. On Saturday, January 31, 1891, when her mother was with her at the Comstock school, Helen spoke to her about the capsules. They made her feel ill, she said, and she was tempted to throw the last one out of the window. She produced the box with the single capsule in it, and would perhaps have thrown it away had not her mother most unfortunately persuaded her to take it. It was the poisoned capsule. The mother returned to Ocean Grove, and when next she saw her daughter the girl was dead.

When Mrs. Potts had left the school, Helen visited the headmistress in her room, where they read out loud from the "Spare Hour Series." Helen chose one of the "Talks About Dogs"; it made her cry. At about ten o'clock she went to the room that she shared with three other girls; that evening they were at a symphony concert. They came back only half an hour after Helen had gone to bed, and as they lit the gas she awoke. "Girls," she said, "I have had such beautiful dreams, I could dream on forever. I have been dreaming of Carl." But soon she began to moan, complained of a feeling of numbness and a choking sensation, and said she felt as if she were going to die. The veins protruded on her forehead and her skin was blue; she had difficulty in breathing; and when one of the girls rubbed her forehead she said that she could not feel the rubbing. Her friends told her that if she went to sleep she would feel better in the morning, but her condition seemed to grow worse, and about an hour after their return to the school they aroused the headmistress, who immediately sent for Dr. Fowler.

It was to prove unfortunate for Harris that this doctor happened to have had seventy-five cases of morphine poisoning in his own experience. He arrived soon after midnight, and on finding the patient in a state of deep insensibility sent for assistance and began artificial respiration. The two doctors worked over Helen Potts all night, and before morning they sent for a third. Artificial respiration was kept up without interruption, and the patient was also given rectal injections of strong black coffee, hypodermic injections of atropine, caffeine, whisky, and digitalis, and treatments with electricity and oxygen gas. The symptoms indicated poisoning with an opiate, and the doctors looked round the room to see what the girl could have taken. It was not long before the empty pillbox was found, marked *C. W. H., Student*, and in the early hours of the morning Harris was sent for. He came at about six. At three o'clock there had been a rally in the patient, but since then her condition had grown worse. Harris was asked by Dr. Fowler what his prescription had contained. "We have a frightful case here," the doctor said, "and there must have been some very great mistake." When Harris told him that each capsule contained four and a half grains of quinine and one sixth of a grain of morphine, the doctor concluded at once that the druggist had reversed the proportions by mistake, and sent Harris round to the drugstore to ask him. Harris returned in half an hour and reported that he had been to the drugstore and that the prescription had been made up correctly; it was, however, proved at the trial that he had not in fact visited the store till late in the morning, after the girl was dead. Dr. Fowler was struck by his perfect lack of concern, for he appeared to be far less interested in the fate of the patient than in the possibility that he might be held liable for it. Shortly before eleven in the morning the heart stopped beating. The doctors withdrew to the window to allow Harris an opportunity for any display of affection or grief; but he showed none, merely exclaiming, "My God, what will become of me?"

When the coroner arrived, in the afternoon, Harris told him the story of the capsules, offering to give him for examination one

of the two that he had kept back. Later in the day he did so. Subsequent analysis disclosed that the prescription had been made up with perfect accuracy. A telegram was sent to summon Mrs. Potts, who arrived in the course of the afternoon, and was met by Harris at the ferry from New Jersey. When he told her that her daughter was dead, she said, "Carl, is this your work?" But she believed his protestations of innocence, and turned to the task of persuading him that Helen must be buried under his name. At this, Mrs. Potts later said in evidence, his terror was frightful. He said, "I would answer just the same if it was Queen Victoria's daughter. She cannot be buried under my name." A few minutes after this conversation Mrs. Potts and Carl were in the presence of the dead girl, and the mother knew that she had to decide what she was to tell the coroner who was waiting outside the door. She made up her mind to conceal the secret marriage and she further improvised for her daughter a fictitious history of heart disease. The object of this deception was to avoid an autopsy, which would immediately have revealed the fact that her daughter had borne a child. The coroner was satisfied and a burial permit was accordingly issued. The body was embalmed by the injection into the femoral artery of a solution of alcohol and sodium arsenite, and was buried in the Mount Prospect Cemetery at Asbury Park.

The case aroused gossip and even suspicion, but it is probable that Carl Harris would have escaped conviction if he had not been so rash as to visit the District Attorney with an offer of assistance in unraveling any crime that might have been committed. Mr. Wellman describes his attitude as gratuitously frank. The case had been given up, Mr. Wellman says, as "suspicious but hopeless," but Harris's visit caused a very thorough reinvestigation to be made of it. Since everything was likely to turn on the possibility of proving that Helen Potts really had died of an overdose of morphine, exhaustive efforts were made to prepare this side of the case by the examination of nearly five thousand recorded instances of morphine poisoning. When this study had been completed, an order was made for the exhumation of the body. Though fifty-three

days had elapsed since the burial, the body was in an almost perfect state of preservation—a condition for which the arsenical embalming fluid was no doubt responsible. Some of the organs were removed for analysis, and an examination was made of the heart and kidneys. The analysis disclosed the presence of morphine and the absence of quinine. A warrant was therefore issued for the arrest of Carlyle Harris, and he surrendered himself to justice.

The trial, which lasted for three weeks, opened on January 14, 1892, in the Court of General Sessions before Frederick Smyth, Recorder of the City of New York. Francis L. Wellman led for the prosecution, assisted by Charles E. Sims. Harris was defended by John A. Taylor, William T. Jerome, and Charles E. Davison. In court, Mr. Wellman handled the whole of the People's side of the case; for the defendant, Mr. Jerome did nearly all the questioning of the witnesses, leaving the opening and closing speeches to Mr. Taylor. The judge was so much restricted in his charge by the laws of the state of New York that for the purpose of enquiry into forensic language his remarks are of no great interest, but all the speeches by the lawyers contain valuable material, and the examinations and cross-examinations of the expert medical witnesses are particularly useful. Mr. Wellman's cross-examination of Dr. Horatio C. Wood of Philadelphia, who was called for the defence, has been greatly admired and is thought to be a model.

Mr. Wellman has in various books written brief (and not wholly consistent) accounts of the trial, but the present account is drawn mainly from a printed transcript in one volume of the official stenographer's notes. The illustrations that accompany the transcript show the defendant as a somewhat complacent-looking young man with wavy hair, a mustache, and pince-nez; there is, however, contemporary evidence that he was good-looking and attractive to women. Helen Potts, in a photographer's pose and wearing a dress with the hideous leg-of-mutton sleeves of the period, does not seem to have been a great beauty, but the illustration is not a good one. Only fifty copies of the book were printed, and there is a unique insertion in the copy which has been con-

sulted for this account. It is an autographed letter from the defendant written while in the death cell at Sing Sing. It concerns a book of poetry which he had been proposing to publish in collaboration with his correspondent, a Mr. J. C. Harvey. "I do not myself see," wrote Harris, "how our little book can be published for some time, because, as you point out, quite a number of poems will be necessary to round it out, and you can very well imagine how hard it is to write anything under my present circumstances. The printed record of my case was handed me a week ago and I have done nothing but study it since—in fact I have scarcely slept!

"However, if I succeed in again dragging my muse into this dismal place I shall send you the burden of her song.

"Permit me to congratulate you upon your 'Rhymes and Lines,' it is a vision of daintiness from cover to cover."

Mr. Wellman's opening was marked by the restrained tone that should always characterise such things. Early in the speech he assured the jury that he would allude to nothing that would not be proved in the evidence. There were, however, as we know from Mr. Wellman's various accounts of the case, several sources of information (conversations, for instance, at which Harris had not been present) that could not be produced before the jury. The following passage from the opening shows the ingenuity which can be employed in finding an excuse for mentioning such forbidden material. It can be asserted with some confidence that the lawyer's true reason for regretting that it could not be produced in evidence was not solely that which he claimed.

After Helen had arrived at her uncle's, he noticed she was not well; she was pale and listless, and one morning she was nauseated at the breakfast table. He went to her room and had a conversation with her, which I would not be justified in repeating to you, as it would not be allowed in evidence in this case. Anything that Miss Potts said in the absence of the defendant cannot be given in testimony. This rule necessarily keeps a great deal of important information from the jury. I am sorry, because it would illus-

trate the beautiful character of this young girl, but the testimony will bristle with evidences of the loving, devoted, Christian nature of this sweet young woman just entering upon her nineteenth year.

When Mr. Wellman came to deal with Carl's visit to Canandaigua he spoke in a tone of well-directed irony:

It may be interesting at this juncture to pause for a moment and see what has become of Carlyle. Where is Mr. Harris at this time, while his secret wife is convalescing from her serious illness at Scranton? Is he at Ocean Grove? No. He has been there; but he has gone. Is he in New York? We cannot find him there anywhere. Where is Harris? Can that be he at Canandaigua, at the Webster Hotel? No, surely not; that is Carl Graham. But it looks like Harris. Carl Graham, according to the register; but Carlyle W. Harris according to the mail claimed by him. Who is it that is with him? Who is that young lady? Are they married? She is very young—she is very beautiful. They are together all day, all the evening; plainly they are lovers. Are they married? Who is she? Let us inquire at the hotel how they came.

Wellman was not insensitive to the pathos of the case. Here is a passage from his description of the deathbed of the victim:

When Dr. Baner arrived, fifteen minutes later, she was breathing once in two minutes; she was almost gone, and then they began artificial respiration as one would in a case of a drowned person. They raised the hands over the head, bringing them down on the chest and pressing them into the chest, thus making the lungs move artificially. And so we see these two doctors all that weary night moving her arms up and down and trying to bring back the breath of life into that poor young girl's body. It is one o'clock; it is two o'clock; it is three; it is four; it is five; still these two men stand working over that unconscious form.

Mrs. Potts was referred to as *the grief-stricken mother*, and her daughter as *the poor, innocent school-girl* or as *Carl's girl-wife*. The motives for the crime, as has already been explained, were not as clear as the prosecution might have wished them to be in a case

in which the connection of the defendant with the crime had to be proved by circumstantial evidence. Mr. Wellman understood this better than anyone, and well knew that when he dealt with the motive he had come to a critical point in his speech. He accordingly suggested the most plausible motive that he could think of, while assuring the jury, in the same sentence, in case they should not be satisfied with what he had to offer, that something more convincing would be forthcoming as they heard the witnesses. Who would guess from the following sentence what difficulties must have beset the speaker as he composed it?

Now, gentlemen, it is claimed by the prosecution in this case that for motives which will become patent to you as you hear the evidence the prisoner at the bar, having become tired of his wife, and knowing that within eight days he would have to declare her as his lawful wife and submit to a ministerial marriage, prepared this medicine for her as a remedy for her sick-headaches . . .

Mr. Wellman always used the words *load* and *unload* in describing the process by which the defendant was alleged to have emptied and filled the poisoned capsule—an excellent choice because it suggested that the capsule was a deadly weapon.

During most of this speech the emotional tone was kept down, but at one point, in describing the alleged machinations of the defendant, Mr. Wellman allowed it to rise:

In a case of death by willful poisoning a jury must expect to find as defendant a cunning, shrewd, clever, calculating man, one who weighs circumstances and prepares for them. Such a man does not use a knife or pistol. He does not strike in passion or in public. He lays his plans carefully and discounts in advance possible failures in his calculations. Such an one was Carlyle Harris. He was a medical student. It is fair to presume that if he gave this morphine in the manner described, he knew just what the effects would be and he knew the difficulty of detection in a post-mortem examination, because all the medical authorities agree that morphine is so quickly absorbed into the system that it frequently happens that, when very large doses are taken, only traces can be found

in the stomach after death, and having given a trace, a sixth of a grain of morphine, who could discover or prove that he had given her more than that amount. Had not these roommates of hers gone to the concert that night, had they gone to bed as ordinarily with her, had they not come in late and awakened her, the first sleep produced by the drug would have been the *sleep of death*. Had this plan succeeded there would have been no talk about the druggist, no investigation into the matter to prove the druggist had made no mistake or had not properly compounded the prescription; it would have been said she died from natural causes; no *symptoms* could have been testified to by the doctors and Harris would have gone to his wife's funeral an object of sympathy to all her friends and relatives. But the plans of the shedder of human blood always fail. So this one failed. Murder will out, because God wills it so!

The statements at the end of the paragraph are unfortunately false, and it is perhaps a little odd that Mr. Wellman should have allowed himself to make them. It was the feeling aroused that was important, not the statement of fact. They were meant to be taken rather as poetical expressions of wishes than as formulations of scientific truth, and as utterances of feeling they were probably effective with the jury. Effective, too, was the passage in which he described in these words the purposes of the prosecution and the defence:

The plan of the defense in this case will be, I presume, to try to raise a doubt in the minds of the jurors—a doubt as to the cause of death—as to the reliance to be placed upon expert testimony.

In closing this case it will be for you and me, gentlemen, to clear the atmosphere and to try, through the doubts raised by the defense, to get at the real truth of the matter and mete out justice to this defendant.

To be noted in this passage are the identification of the speaker with the jury (*you and me, gentlemen*) and the attribution of *doubt* and *fog* to the defence, while *real truth* and *justice* are on the side of the prosecution. Even the word *this* in *this defendant* is well chosen, as suggesting that the defendant is not the only

criminal who has had to be convicted, and that the punishment of poisoners is a routine duty that need arouse no hesitation in the jury.

The prosecution was able to bring into court a number of medical witnesses, including the three doctors who had attended the dead girl, who were willing to swear that the symptoms indicated death by morphine poisoning, and nothing else. But the prosecution lawyers were certain to be confronted by expert medical witnesses called by the defence who would testify that the symptoms were not sufficiently definite to make possible an unequivocal pronouncement on the cause of death. With this in mind the District Attorney had ordered an autopsy, whose result had confirmed the suspicion that Helen Potts had died of a large dose of morphine unaccompanied by quinine. If this fact could be certainly established, it would go far to convince the jury that Harris had emptied a capsule and refilled it with pure morphine. But there was this difficulty: a small quantity of morphine was included in the capsules made up by the pharmacist, so that it was open to the defence to claim that the morphine found in the body—it was a mere trace—came from this innocent source, which might also account for the “beautiful dreams” that Helen Potts had spoken of. Hence the importance to the prosecution of the absence of quinine in the body after exhumation. Quinine is supposed to remain longer than morphine unchanged in the system. Since the pharmacist’s capsules had contained twenty-five times as much quinine as morphine, the presence of morphine in the body, unaccompanied by quinine, would, if proved, show that an additional dose of morphine must have been taken by the deceased. The evidence of Professor Wormley, who swore that the prosecution analyst had made a mistake in his tests for quinine, might therefore, if uncontroverted, have destroyed the case for the prosecution. Mr. Wellman’s handling of this witness was one of his most notable feats.

Mr. Jerome had a more difficult task in cross-examining the scientific witnesses for the prosecution. In his efforts to mitigate the effect of the uncompromising assertions that they had made in

their direct examinations, he frequently invited them to choose between extremes. The following passage, for example, occurred in his cross-examination of Dr. Fowler:

Is the pupil of the eye always contracted in poisoning by opium or its derivatives?

In all cases that I have ever seen.

As a scientific man, can you state whether or not it always is contracted?

No, sir; I cannot, because I have not seen all the cases; from my reading on the subject, it is a generally accepted symptom.

What is the smallest dose that you ever heard of causing death, reported in a reputable medical publication?

A great many things are reported in reputable medical publications which are not well sustained, and which afterwards prove to be false; I do not impugn their veracity, but I impugn their observation and lack of knowledge of the other conditions associated.

To be noted here are the enquiry whether contraction of the pupil *always* occurs, and the estimate demanded of *the smallest dose that you ever heard of*. A similar passage is to be found in Mr. Jerome's cross-examination of the prosecution witness Dr. William H. Thomson:

If a person is found in a profound state of coma so that the arms drop helplessly at the side, the eyes do not react to light, nor do the reflexes act responsive to stimuli; under those conditions could it be determined whether that condition was the result of paralysis or brain trouble or narcotic trouble from those things alone?

From those things alone, no.

So that medical science will not now enable a practitioner to say, in your judgment, if he simply tests the eyes to light, touches

them with his fingers, tests the reflexes and finds the arms dropping to the side, those facts alone would not enable him to say that the subject is suffering from narcotic poisons?

If he does not know any more than that, no.

Here the device is to ask what could be inferred from certain facts alone when many other facts had been included in the evidence.

Jerome's attitude to the expert witnesses for the prosecution was one of exaggerated deference. "Of course I am only trying in my ignorant way," he said to one of them. "I am but a child in the hands of you scientific gentlemen." He was unable to shake the evidence of the leading prosecution witnesses in any vital particular. From Professor Witthaus, the chemist who had carried out the analysis of the remains, he got little after eight hours of cross-examination. The beginning of Mr. Wellman's re-direct examination of this indispensable witness is an example of skillful reiteration for the benefit of the jury.

Mr. Jerome has asked you about ptomines; is there any known ptomine that will give all the reactions obtained by you?

No, sir.

Is that the reason you are satisfied there is no ptomine but morphine?

Yes, sir.

Is there any known substance that will give all the reactions obtained by you but morphine?

No, sir.

And is that the reason you say to this jury that you do not give it as your opinion that you found morphine, but that you did find morphine?

It is, sir.

When Mr. Taylor began his opening speech for the defence, he attempted to divert the attention of the jury from the facts of the case by producing irrelevant feelings in their minds.

May it please the Court, Mr. Foreman, and Gentlemen of the Jury: The time has at last arrived when the counsel for the prisoner may present their views of this unhappy catastrophe to you. Consider for a moment, gentlemen, the position of this young man. He has now been under arrest and in confinement for nine months; he has been subject to all the degrading influences of prison life; denied access to every one but his counsel and family, and yet under all the enervating influences which accompany these conditions he has preserved his self-respect and has been able to look you, gentlemen, each of you in turn, steadfastly in the eye with a confidence and an assurance which, in my judgment, can only arise from a sustaining belief of innocence in his heart. This indictment is born of a monstrous suspicion; a suspicion which, taking its lodgment in the heart of a woman, concerning whom I shall have nothing but words of praise to say, fanned by the flames of envy, supplied by the machinations of possible enemies, has developed into a consuming fire which threatens to overwhelm its unhappy victim, and to compass the lasting disgrace of his family. I shall hope, before this case is done, gentlemen, to demonstrate to your entire satisfaction that there is nothing more or less in the case of the prosecution than such a suspicion.

Mr. Taylor's attitude to Mrs. Potts, in this passage and elsewhere, was always one of respect, and in his protestations of sympathy for Helen Potts he outdid Mr. Wellman. The defendant's mother, Mr. Taylor thought, was so admirable a woman that no one could believe her son to be a murderer:

His mother is a gentle, refined, spiritual-minded woman, whose writings under the name of Hope Ledyard are in almost every household in this country. She alone of all the friends who drop away from a man when the clouds come about him, has followed him into court, has been with him, has never deserted him and will not, whatever the issue of this trial may be. Gentlemen, out of such

planting the upas tree of murder does not grow. Every instinct of human nature, every element of human experience suggests that in that condition there is, at least, nothing which should point to Carlyle W. Harris as a murderer.

As to Helen Potts:

There shall come from my lips during the progress of this case, gentlemen, not a word of condemnation or innuendo or of suspicious inference against that beautiful, intelligent, refined and charming young woman, who whatever any one else may have said concerning her husband has never in any way, under any circumstances, or in any passion uttered a word on paper or anywhere else against the abiding affection which she entertained for him and her absolute confidence in him; and, as if in confident rejection of any such hypothesis, it is on record in this case, gentlemen, that if the testimony of the prosecution be true the last word which was upon the lips of Helen Potts was the name of her husband, "Carl."*

Most of Mr. Taylor's opening speech was taken up by an attempt to discredit the medical and chemical evidence, mainly by a covert appeal to the ignorance of the jury and by a suggestion that scientific experiments might be good enough for the witnesses but would never convince plain men:

For, gentlemen, you and I, whatever the learned men in this case otherwise may determine, I with my imperfect knowledge of the sciences which have been displayed here, you with what I assume to be no more than the average knowledge among men, are never going to rest satisfied with a determination of this case which shall wander out of the plain domain of common sense into the uncertain atmosphere of scientific possibility, and the determining of the presence of morphine by answering such questions as whether the movements of Frog No. 1 correspond with the

* This sentence is full of unconscious irony. It was known to the prosecution that before lapsing into the coma from which she never emerged, Helen Potts had anxiously inquired from the three girls in her room whether they thought Carl could have given her anything to harm her. The conversation could not be given in evidence.

movements of Frog No. 2 and whether Frog No. 3 doesn't disclose a different condition of the eyeballs from Frog No. 2.

The frogs that he referred to had been used in the experiments of Professor Witthaus, who dosed them with the substance, alleged to be morphine, recovered from the body of Helen Potts, and then observed in them the symptoms of morphine poisoning. Only an exceptionally naïve juryman could believe that "scientific possibility" is less reliable in questions of medicine and chemistry than common sense, whose conclusions are, indeed, frequently plain but are also, alas, so frequently wrong.

The doctors not only made mistakes in their laboratories, counsel said, but were also desecrators of the tomb. "Fifty-three days after the burial of this body scientific men have probed their way about the body, taken parts of it and carried them to the laboratory." As to the diagnosis made by Dr. Fowler, it was made so rapidly that it may very well have been wrong:

I am either grossly mistaken in the judgment of men which I make upon observation, or there has already upon the case of the People come to your mind very grave misgivings, doubts of a serious character whether the diagnosis made by Dr. Fowler five minutes after he entered this sick-room, called in the hurry of the night and finding a person prostrate to the point of unconsciousness, might not have been a mistaken one.

At this point the jury may have reflected that there are two likely reasons for a rapid diagnosis: haste, or symptoms so obvious in their indications as to make error impossible. Mr. Taylor was not reticent in telling the jury that he thought well of them:

And, gentlemen, you will bear me witness that the counsel for the defence have taken the greatest pains to see that you twelve men, selected from seventeen hundred thousand of your fellow-citizens, should be men of intelligence, of intellectual equipoise, and men calculated to sit in cool, calm and unbiased judgment

upon this young man . . . Now, you are intelligent men and have watched with what seemed to me unusual attention for two weeks the testimony which has been given in this case.

The two important witnesses for the defence were Professor Wood and Professor Wormley, both of Philadelphia. Before their appearance on the witness stand, Mr. Taylor delivered a warm eulogy on each, and also attempted, though without much success, to secure commendations for them from the expert witnesses for the prosecution. "Professor Wood," he said, "stands at the very summit of his profession, and is the most eminent diagnostician in the country"; Professor Wormley was "one of the first authorities in the country upon these questions." After these efforts, which would nowadays be called a "build-up," the collapse of both witnesses under cross-examination was a disaster for the defence. Professor Wood's discomfiture on the witness stand was afterwards described by Mr. Wellman as the turning-point of the whole case. It produced roars of laughter, and though there were still two hours before the usual time of adjournment, the lawyers for the defence begged the court for a recess until the following day.

In his direct examination Professor Wood maintained that it is not possible to diagnose morphine poisoning positively by the symptoms alone. (Mr. Jerome, as counsel usually does in these situations, chose the extreme case: *positively*; and *from the symptoms alone*, even though other evidence was available.) "I base my opinion," said the professor, "partly upon wide reading of the literature of the subject, and what seems to me to be the general consensus of professional opinion about it, and partly, very largely, I can say, on my own experience." The claim of extensive experience was to be fatal to him in cross-examination, which proceeded, in part, as follows:

I understood you to say that in your opinion the symptoms of morphine could not be sworn to with positiveness. Is that correct?

I don't think they can, with positiveness.

Do you wish to go out to the world as saying that you have never diagnosed a case of morphine poisoning excepting when you had an autopsy to exclude kidney disease?

I do not. I have not said so.

Then you have diagnosed a case on the symptoms alone, yes or no? I want a categorical answer.

I would refuse to answer that question categorically; the word *diagnosed* is used with two different meanings. One has to make what is known as a *working diagnosis* when he is called to a case, not a positive diagnosis.

When was your last case of opium or morphine poisoning?

I can't remember which was the last; I think the last was a case some years ago; I have had no recent case of severe opium poisoning.

How many years ago?

It may be eight or ten years ago.

Was it a case of opium poisoning?

Morphine poisoning.

Was there an autopsy?

No, sir.

How did you know it was morphine poisoning?

I found out from a druggist that the woman had taken seven grains of morphine.

You made no diagnosis at all until you heard from the druggist?

I made what I call a working diagnosis.

What did you do?

I put the woman down and commenced artificial respiration.

Well, you would do that with morphine poisoning, wouldn't you?

I certainly should.

That was about eight years ago; do you remember the case you had before that?

I remember another case.

When was that?

That was a still longer time; I guess probably twenty years ago.

And that was the next case before this?

No, I don't say that.

Well, give me the next case before this one; you had a case eight years ago; now when was the next one; one case twenty years ago?

I remember another case probably between those; I don't know the date.

About how many years ago?

Fifteen probably.

Did you know then what the person had taken?

Yes. I knew what the person had taken, to the best of my memory.

You had a case twenty years ago and you knew what was taken then?

Yes.

So that within twenty years you can remember three cases you have had of morphine poisoning, can you?

Opium poisoning; yes, sir.

Was there more than one of those three cases that was morphine poisoning?

No, sir; one was with Dover's powder.

Then you have had one case of morphine poisoning in the last twenty years?

One case that I distinctly remember; yes, sir.

And will you come here from Philadelphia, and state that the New York doctors who have gone on the stand for the People and who attended this patient, and who said that they had attended seventy-five similar cases, and were constantly having them—and who testified as a matter of fact that this was a case of morphine poisoning; that they had seen the patient and had treated her; will you with one experience in twenty years, come here and say that you don't believe that our doctors can tell what they saw or what she died of?

Yes, sir; only I deny part of the statement.

Now, you state, do you not, that the symptoms of morphine poisoning could not be told with positiveness?

Yes, sir.

That was your best opinion, based upon your reading and upon your own experience; your own experience in twenty years being confined to one case; is your reading confined to your own book?

No, sir.

Is your reading confined to your own book?

No; I say no.

But I suppose you embodied in your own book the results of your reading, didn't you?

I tried to, sir.

Allow me to read to you from page 166 (reading): "I have thought that inequality of the pupils"—that is where they are not symmetrically contracted—"I have thought that inequality of the pupils is proof that a case is not one of narcotism; but Professor Taylor has recorded a case of opium poisoning in which it occurred." So that until you heard of the case that Professor Taylor had reported in which inequality of the pupils occurred, your opinion up to that time was that it never had occurred, i.e., symmetrical contraction of the pupils of the eyes?

Yes, sir.

Well, sir, did you investigate that case far enough to discover that Professor Taylor's patient had one glass eye?

I have no memory of it.

That has been proved here to be the case. You may go back to Philadelphia, sir.

The conspicuous success of this cross-examination was made possible only by the rash and unfounded claim by the witness to extensive experience, but there is no doubt that counsel made the best use of the advantage thus given him; by insisting on the discussion of specific cases, by putting his questions in an extreme form (You have never diagnosed a case? . . . You made no diagnosis at all?), by reiteration (Is your reading confined to your own book?), and by appeals to local feeling.

The other Philadelphia expert, Professor Wormley, testified that one of Professor Witthaus's tests for quinine was valueless because he had not made sure that the quantity of bromine used bore a certain relation to the quantity of quinine supposed to be present. Professor Wormley made an impression on the jury by producing two vials of which one contained bromine in the correct proportion and the other did not. Though both contained quinine, only the former showed the green color that the test is supposed to produce. Fortunately Professor Witthaus had taken the precaution, indispensable in analytical work, of running a blank test. Mr. Wellman made short work of the rest of Professor Wormley's evidence: the cross-examination is perfect of its kind.

If you were informed that Professor Witthaus, in connection with his bromine test, used alongside of him as a blank test one to eight-thousandth of quinine, and that it showed an emerald green under the amount of bromine that he used in this test, would that modify your opinion?

Yes, sir; with the solution.

If you were going to look for the absence of quinine under any circumstances how would you go about it?

I would apply those tests.

If you wanted to know that a given substance did not contain quinine, how would you go about it?

The fluorescence is one.

Bromine, would you use that?

Yes, sir; I would use the bromine and chlorine tests; they are others.

Dr. Witthaus used those; what else would you use?

Those are all, and the bitter taste.

If you were going to find that quinine was not in a particular substance, you would use precisely the same tests Professor Witt-
haus did?

Yes, sir.

If you found after using those tests that you did not find quinine, you would be willing to state it was not there?

If there were no negative results; yes, sir.

It is instructive to compare the descriptions of Professor Wormley's evidence as given in their closing speeches by counsel on either side. This is what Mr. Taylor said of it:

Then we produced Professor Wormley, and he, I think, demonstrated conclusively to you that the bromine test, which was applied by Professor Witthaus to determine the absence of quinine, was an utter failure because he showed you in these two vials—the color of which still remains in this—that you had only to alter the relations of the quinine to show that the same amount of bromine in solutions of larger amounts of quinine could indicate nothing. For instance, there is the larger amount of quinine, and nothing is shown. (Mr. Taylor here showed two vials to the jury.) All dependent, you see, upon the delicate combination.

Mr. Wellman's account of this testimony is an example of the effective use of the repetition that is necessary to drive a point home with the jury:

They can find no one in New York to contradict Professor Witt-
haus. They had Professor Doremus sitting beside them here in the court-room. He is a widely known chemist. But they did not call him to the witness stand. Why? Because, gentlemen, he knows that Professor Witthaus' methods were correct, and that they cannot be overturned. So then they go to Philadelphia, and they produce before you Professor Wormley, a good, honest, old gentle-

man, and he says in effect: "I can give you this for what it is worth," and he tries the bromine test with two or three different quantities of bromine in a one to ten-thousandths solution of quinine and he finds, if he puts in two drops of bromine, he gets a little different color, and on this they ask you to condemn Professor Witthaus' examination for quinine and to acquit the prisoner. I asked him how his opinion would be changed if I told him that Professor Witthaus kept as a side test a one to eight-thousandths solution of quinine, and he said frankly: "That would modify my opinion." Then Professor Witthaus told you that is precisely what he did do. He did not test these colors, he said, without a side test of quinine. He made a solution, one to eight-thousandths of quinine. He says that his quinine gave the emerald green reaction, but that his residue from the contents of Miss Potts' body did not. He says that he then tried the fluorescence test. His quinine gave the fluorescence, and his residue did not. Next he tried the taste test. He found he could taste quinine in so small a quantity as one part to five thousand, and that it was not in the residue up to that proportion. I asked Dr. Wormley if he was going to hunt for the absence of quinine what means he would employ, and he said he would take the fluorescence test, the bromine test, and the taste test. Precisely what Professor Witthaus did. It was all that any chemist would do, and if there were no results, he would be justified in saying that there was no quinine there.

The use of extreme cases in framing questions put to the expert witnesses was specifically referred to by Mr. Wellman in his cross-examination of Dr. Dana, called for the defence:

Did you write out these questions for Mr. Jerome to ask you?

I suggested the line of enquiry; I wrote out some of them.

I notice there has been care to use the words: "Can you positively say," "Must it necessarily be," "Can't absolutely be said"; these are important factors in your answers, are they not—those phrases and adjectives?

I am perfectly willing to say that they are important factors in that question.

So much for the examination of the witnesses. Mr. Taylor's closing address on behalf of the defendant is worth quoting in its opening passages for the variety of the emotional distractions which it offered. He appealed, in emotionally charged language, to feelings about the family, the nation, the importance of the law, the chivalry between colleagues, the responsibility of a jurymen, the human conscience, God, civilisation, human progress, and the duty of a lawyer to his client. The diction is loaded with clichés: *the hollow of your hands; the foundation stones of the temple; labors drawing to a close; the scales of justice; a hair's breadth; the kernel of truth; the divine bosom of Omnipotence itself; the morning stars sang together; the birth of creation; and the grossest reptiles that ever crawled upon the face of the earth.* These indications, and the lack of any reference to the point at issue, make the passage a characteristic specimen of the emotive forensic style as used in a bad case.

May it please the Court, Mr. Foreman and Gentlemen of the Jury: The life of this young man, the peace of mind of this gentle woman, his mother, the good repute of this commonwealth, as I believe, all lie in the hollow of your hands.

I say the good repute of this commonwealth, because I believe that if, out of this chaos of contradictory evidence, it should be found that a verdict of guilty could be solemnly given by twelve men, selected with the care that you have been from the commonwealth itself, the foundation stones of the temple of jurisprudence would indeed be shaken.

We have reached a stage in this investigation when the labors of counsel are drawing to a close. My associate, who has, with the greatest chivalry, taken from my shoulders the labors of this case, has already fulfilled the part assigned to him. When this Court shall adjourn at recess I shall have completed all that I may do in behalf of this young man and we shall have approached, gentlemen, a time in the history of this case when upon your shoulders is to fall the great responsibilities of this issue.

You are fortunate indeed, as is also the prisoner, that there is presiding at this trial a jurist of large experience, great legal acquirements, and who has shown himself abundantly competent

during his long judicial service to hold the scales of justice even before the eyes of the jury charged with its administration.

And, gentlemen, much as I value the life of this prisoner and with as great a solemnity as I view the consequences of your verdict, I have no hesitation in saying that beyond the life of any man, beyond the life of a whole community, it is more important that the scales of justice shall not quiver from their centre by a hair's breadth. We are a justice-loving people. But for that the institution of the jury itself would have long since disappeared. The District Attorney cannot say to you anything which shall more strongly appeal to you to support the absolute justice of these facts which are brought before you, to find from them the kernel of truth if you may.

I said that your responsibility was about to begin; and, gentlemen, that responsibility is one which is not equaled for the moment by the highest officer in this great federation of States. A man may be elected to the presidential chair of the United States, he may fill that office with dignity and honor to the commonwealth, and yet, in his long career of public service, it may never happen to him to have in his custody the life of his fellow-citizen. That responsibility, unsought by you, assumed in the interest of the public whose servants you are, is now laid upon you, and I ask that you deal with it upon your conscience before God in Heaven.

And it is a responsibility, gentlemen, which cannot be shifted: It is a personal responsibility. There is to-day an agreement, higher than any official seal can ratify, between each one of you men, and this young man, that without prejudice, without favor, void of all guessing and suspicion, you shall deal with these facts upon that sacred relation which you have assumed with him entirely as they shall address themselves to your individual consciences. The highest arbiter in any land or clime is the human conscience. It is something that cannot be bought or sold in a manly man. It comes from the divine bosom of Omnipotence itself. It was planted in the heart of man when the morning stars sang together at the birth of creation. It has done all for civilization which has ever been done. It is the one living germ of intelligence which lies at the root of human progress the wide world over. It is the highest forum in any land. And it is to that tribunal and to that conscience that this young man with confidence appeals.

Now, gentlemen, the charge against the prisoner is the most infamous that it is possible for the human mind to conceive. Either

this young man is one of the grossest reptiles that ever crawled upon the face of the earth, or he is an abused man sitting here under the cloud of a fearful accusation, which, if it be true, ought to bring upon him all the condemnation which the law affords. I am not here to excuse or palliate any such crime. I am a man like yourselves. I have not surrendered my conscience to any man here or elsewhere. I want you, gentlemen, to understand that I am a part of this community like yourselves. I claim to deserve at your hands that recognition which a man ought to have who looks his fellow-man straight in the eye and says to him the things which he believes.

At a later stage of Mr. Taylor's speech he referred to the evidence of Ewen McIntyre, the druggist in whose store the capsules had been compounded. The cross-examination of this witness had been carried out by Mr. Jerome, and ran as follows:

Do you remember about the 18th of April, 1859, putting up a prescription for old Dr. Sabine of this city?

I don't know that I do.

Put it up for a lady that was confined?

No, sir, I do not; I do remember having a prescription put up for Dr. Polk, calling for hydrobromic acid, and instead of that hydrochloric acid was put up; I was sued and I gave a thousand dollars to compromise the suit to save my good name.

It is instructive to compare the accounts of this testimony as given by Mr. Taylor and by Mr. Wellman. This is Mr. Taylor's version:

He swore with the greatest confidence on cross-examination that he never had made any mistake in his store that he knew anything about. You remember that. You watched this evidence very carefully. I never saw twelve men more conscientiously attend to evidence in a case than you have done. You remember that that was exactly what he said. And yet he was confronted with a case in court where, within five years, as I remember—sufficient for it

if it is ten *—but you have your recollection as to that—where, within a short time, he had actually paid over under pressure of a suit the sum of a thousand dollars by reason of a mistake in his store. . . . Mr. McIntyre is an elderly man. He has been retired from business. He had undoubtedly forgotten that within five years he had made a mistake, a grievous error. His attention was called to several other cases, and he had forgotten those.

Here is what Mr. Wellman said about McIntyre's mistake:

It has also been shown that Ewen McIntyre is regarded as one of the most reliable chemists in the city; he has been President of the College of Pharmacy for thirteen years, and he has made no serious mistake in his fifty-two years of experience as a pharmacist. For one slight mistake that he did make, for his reputation's sake, so unsullied was it, he gave a thousand dollars in money to maintain his good name.

Mr. Taylor's efforts to distract attention from the alleged crime of the defendant led him to make attacks on the prosecution witnesses. The Scranton doctor who helped Dr. Treverton carry out the abortion he called "a professional Bardolph," and Treverton himself was described as "one of the vilest men that ever carried on their precarious profession in any city of any land." "I am justified," said Mr. Taylor, "in calling your attention to the nature of these persons, who, from the vantage ground of the witness chair, hissed their venom at this young man." Later in his speech, in referring to his client's attitude towards women, he produced another specimen of the emotive forensic style:

Through all the experience of human beings there runs continually the distinction between love and lust. Lust lurks in the out-of-the-way places of society. It festers in the public highways. It riots in undiscovered places, and feeds upon the offal of humanity. But love nestles in the bosom of the home; it sits by the firesides of the land; it flourishes best in the open sunlight of publicity; and has its origin and its seat in the bosom of God Himself. Yet I am

* It was thirty-three.

not prepared to say that men with an honest, earnest love, may not be misled into the byways of lustful indulgence and still return to their allegiance of love and banquet on its pure, unspotted joy.

Near the end of his speech Mr. Taylor tried to deal with the deadly testimony of the analyst.

Let me recall your attention a moment to this trace of morphine. Why, it all depended upon the fluorescence developed in a drop of water, so you have to say in this case, if you consider that as a determining fact against the prisoner, that a single human eye, unaided by any other eye, looking into a drop of water detected an effervescent * color in that drop of water, and if that human eye, looking into that single drop of water, did not really see what it thought it saw, an innocent man is liable to be condemned. Why, gentlemen, we might as well have no reasonable doubt in the law, if upon evidence of that kind you are to find this prisoner guilty. I speak no word of disparagement against the scientific men. They are the leaders of thought in our age. We depend upon them for the most momentous advances made in human progress. But when it comes to the life of my fellow-man I want to bank upon the solid common judgment of twelve men of his own city rather than on the fleeting effervescent * contribution to evidence afforded by this scientific chemistry.

Here again, all that can be said against the chemical evidence is that, in the opinion of the speaker, it contradicts "the solid common judgment of twelve men of his own city." The end of the passage affords an example of the use of the word *scientific* as a bias word indicating contempt. The use is rare, and the jury may have been inclined to wonder what kind of chemistry *unscientific* chemistry would be.

Mr. Taylor's attitude to opposing counsel was, however, wholly what one would expect. "I am to be followed," he said, "by a gentleman of matchless resources, of adroit sagacity, of a masterful power of presentation." He begged the jury not to forget the *facts* which he, Mr. Taylor, had presented to them, in favor of the

* Mr. Taylor probably said *evanescent*.

argument and *flimsy hypothesis* that Mr. Wellman would put forward; they should not, he said, *allow* their minds to be *warped*. "Yesterday afternoon as he was leaving the court his poor mother threw her arms about his neck and said, 'I shall have you with me tonight.' Gentlemen, if you accept the interpretation which I have presented to you, I beg of you that you shall give back this boy to his mother's arms, and that you shall do it tonight."

Mr. Wellman's closing speech for the prosecution was an effective example of the factual style. Appeals to the emotions were brief and sober, as in this passage from the beginning of the address:

I stand here for the law. I stand here opposed to those—and those only—who have broken the law, and opposed to those who ask you to break the law. I stand opposed to force and brute violence, and I ask that the law may be enforced for their suppression and their punishment; for upon the law and its faithful enforcement depend all the interests of the People, of the individual and the community at large. I ask at your hands, in this case, such a verdict as shall not be the subject of ridicule in this community, nor be quoted as giving indulgence to the infraction of that divine command, "Thou shalt do no murder."

He described clearly the tactics of the defence lawyers that led them to ask questions couched in extreme terms:

Are you going to allow such positive testimony and from such authorities to be weakened by the sophistry of the witnesses of the defence, by the statements made by Dr. Dana, for instance, who admitted that he had written out the questions himself to be put to himself by the lawyers, and who said that the adjectives used, "absolutely certain," "with positiveness," etc., were important factors in his answers? Why, gentlemen, any physician would admit that. We cannot say anything is absolutely certain in this world; not even a mathematical proposition is demonstrated with absolute certainty.

On the general tendency of the defence to obscure the issue to be tried, Mr. Wellman produced an effective metaphor—the

octopus. Of the chemical metaphor that followed it, nothing favorable can be said. The vehicle is drawn from the chemical nomenclature to which the jury had become accustomed, but though *truth* may be represented as a *searching acid*, there is nothing to identify an *alkaloid* with *sound reasoning*, or *salts* with *common sense* (nor are salts necessarily *wholesome*). Whether Mr. Wellman said *staple* or *stable* is uncertain, but neither word goes well with alkaloids. Chemists cannot combine salts, acids, and alkaloids, and if they could, there is no reason to suppose that the resulting substance would clear waters that had been darkened by an octopus. The metaphor is bad, therefore, because the vehicle is inconsistent and because it does not illustrate the tenor.

I wonder if any gentleman of this jury has read Victor Hugo's account of the octopus. He says that no one can appreciate such a fish who hasn't seen it. He describes it as having the "aspect of scurvy and gangrene." He calls it "disease embodied in monstrosity"; its folds strangle, its contact paralyzes. It has arms or antennae with which it draws in its victims. The sailors call it the "devil fish." It has no beak to defend it like the bird; no claws like the lion; no teeth like the alligator. When attacked it retreats. It has what might be called an ink bag, and to protect itself it lets out a dark fluid from this bag on the surface of the water, thus making the water dark, almost black, and by this means it tries to escape in the darkness. Is there any simile between this description of the octopus and the defense in this case? Have they suggested to you here any defense? Or have they rather tried to employ the ink bag of the octopus and by making all black around them to escape in the darkness!

I shall ask you in this discussion, wherein there is already so much of chemistry, to join me in combining some of the wholesome salts of common sense with the searching acid of truth and the staple alkaloid of sound reasoning, and see if we cannot, by the use of this solution, clear the water of its clouds and darkness, so that through it we can behold the form of the retreating octopus, and bring him back for punishment.

Here, from a later passage in Mr. Wellman's speech, is an example of skillfully managed reiteration:

What did cause the death of Helen Potts? Alas, is it possible you can come to any other conclusion than the one dreadful one of morphine poisoning? It is claimed by the People that she died of morphine poisoning; the physician who attended her says—morphine poisoning; the assistant who helped to save her, says—morphine poisoning; the second assistant, who was called in five hours before she died says—morphine poisoning; Professor Thomson, when the question was put to him embracing all the symptoms, including the discoveries at the autopsy, says—morphine poisoning; and, putting the same question to him, but confining it to the symptoms alone, without the autopsy, he answers—morphine poisoning. Dr. Thomson, you will remember, is a man who stated that he had devoted his lifetime to the study of the effects of opium and morphine. Dr. Allan McLane Hamilton says—*morphine poisoning*.

From time to time, though only briefly, the speaker touched on the emotional possibilities of his theme.

For remember, gentlemen, that while living witnesses may depart from the truth or be mistaken, you have before you in this case the evidence from the grave, the mute but eloquent pleadings from her who was so foully taken away. Science speaks and mortals turn pale when confronted with those voices from the grave that tell their dreadful story. . . . Gentlemen, the tongues from the tomb are touching and move our souls.

The passage is convincing as well as moving because it ingeniously inverts Mr. Taylor's argument that the common sense of twelve men is more reliable than science. Science is reliable, says the prosecutor, because it *is* impersonal: *science speaks and mortals turn pale*.

Towards the close of his speech Mr. Wellman gave the jury a cogent metaphor to illustrate the nature of circumstantial evidence:

Circumstantial evidence, gentlemen, is not like a chain, where one weak link can weaken the entire chain. It is like a rope or cable; each fact is a strand of that rope; and as we pile one circumstance on another, one fact on another, so we add strands and strength to the rope until we get a cable strong enough to bind the prisoner to

justice. And so in this case, I say that all these facts and all these circumstances are but strands of the rope and add to its strength; if one breaks the rope is not broken, possibly not even weakened. One circumstance might possibly be compatible with innocence if it stood by itself alone, but it is the series of things which, though small perhaps in their individual capacity, do, when grouped together, lead to the inevitable and irresistible conclusion that the prisoner at the bar was the cause of this beautiful young girl's death.

Most of his speech, however, was severely factual and directed to a dispassionate recapitulation of the evidence. The peroration, in which he allowed himself to turn from the mental convictions of the jury to their feelings, was brief but eloquent:

I ask you to go with me to that lonely church yard, and stand for a moment with me by the grave of this unfortunate girl; let us there with bared heads, say a few words in praise of her innocent young life,—she who had a right to live for years in this garden of God's beauty, suddenly taken off and hurled into eternity. Let us write an epitaph on her tomb. "Murdered innocence."

Would to God, gentlemen, we could call her back. Would to God we could bring her back to life once more and could put her loving hand in his, and send them out into the bright world *forgiven*, wiser and better for this sad experience, to live their lives together as man and wife, according to God's holy ordinance. But it is too late. She has gone. Her lovely spirit has left the earth. The die is cast. A terrible doom has settled over this defendant. And we can now only listen to the command of the great Jehovah, "*Who-soever sheddeth man's blood by man shall his blood be shed*"!

Recorder Smyth's charge to the jury was short and offers nothing of special interest. It was, however, nearly eleven o'clock at night before the jury returned with a verdict of murder in the first degree. On hearing the verdict the prisoner's mother, who was present in court, shrieked and fainted. The case was carried to the Court of Appeals, but the appeal justices unanimously sustained the conviction. Carlyle Harris was electrocuted without ever admitting his guilt.

Rex v. Greenwood

CHAPTER X

OF THE MANY sensational murder trials in which Sir Edward Marshall Hall appeared for the defence, scarcely any is more instructive for our purposes than the Greenwood case, in which he was successful in saving a client against whom there was great local feeling, and who at the beginning of the trial seemed, from what was known of the evidence, to be in imminent danger of conviction. So thoroughly did Marshall Hall demolish the witnesses for the prosecution, and so convincing was his final speech for the defence, that when the verdict of "Not Guilty" was given in the little town of Carmarthen the previously hostile crowds received it with uproarious exultation, and *The Times* printed an editorial on the following morning in which it was stated "From the outset the prosecution had a weak case . . . When we read the flimsy evidence we marvel that the indictment was ever proceeded with, and that the DIRECTOR OF PUBLIC PROSECUTIONS had the temerity to put MR. GREENWOOD in the dock." The methods by which the great advocate was able to achieve this complete change of opinion are accordingly well worthy of study.

The circumstances of the case were simple. In 1919 Harold Greenwood, a solicitor fifty-six years of age, was living at Rumsey House, Kidwelly, a small town in Carmarthenshire, Wales. He carried on his profession at an office in Llanelly. His wife, nine years younger than himself, was a sister of Sir Vansittart Bowater, who was very well known in the City and had indeed been Lord Mayor

of London in the early days of the first World War. She had considerable private means, amounting to about £900 a year, and she, her husband, and their four children lived in a fair-sized house with three maids and a gardener. At the time of Mrs. Greenwood's death, which took place in the early hours of June 16, 1919, only two of the children were at home: Irene, aged twenty-two, and Kenneth, aged fourteen.

For several years before her death Mrs. Greenwood suffered from ill-health. She had a small tumor (it was disclosed by the post-mortem to be of a nonmalignant kind) and, more serious, a weak heart. For these complaints she was treated by Dr. Griffiths, who lived not far from Rumsey House and who cared for her in her last illness; his evidence was to be vital at the trial. In the early part of 1919 her condition was worse than usual, and according to her doctor she was failing in health, though without realising it.

On Saturday, June 14, two days before her death, Mrs. Greenwood was in good spirits, and together with the Vicar of Kidwelly attended an afternoon meeting of the Tennis Club. On the following morning, in the opinion of a Miss Phillips, one of her best friends, she was not so well, but she asked Miss Phillips to come to supper on that Sunday evening, an invitation which was accepted. Lunch on Sunday was at about half-past one. Mr. and Mrs. Greenwood and the two children were at table, and they were served by the parlormaid, Maggie Williams, whose cross-examination by Sir Edward Marshall Hall over a year later was to be one of the decisive elements of the case. The meal consisted of roast beef, gooseberry tart, and custard. Harold Greenwood drank whisky and soda; Mrs. Greenwood drank red wine.

Some time in the afternoon, probably about half-past three, Mrs. Greenwood complained to her husband that she was suffering from diarrhoea. He told her that she had been unwise to eat gooseberry tart for lunch. An hour later tea was served, and Mrs. Greenwood drank some tea and ate a little bread and butter. At six o'clock, when she began to feel intense pains round the heart, her husband gave her some brandy, but it made her vomit. She lay

down on a couch while he went to fetch Dr. Griffiths, who came at once. The doctor put the patient to bed, and gave her sips of brandy and water. Harold Greenwood then took him on a tour of the garden, and detained him to play two games of clock-golf. At the trial the prosecution alleged that Greenwood did this to prevent the doctor from returning to the sick woman, whereas Greenwood maintained that he wanted to prevent the doctor from returning to his surgery, where he might have been called away by other patients.

The invitation to supper given to Miss Phillips had not been cancelled (there was no telephone at Rumsey House), but when she arrived she was sent up to Mrs. Greenwood's bedroom. Alarmed at the patient's condition, she went to fetch the district nurse. When the two women returned, about a quarter to eight, medicine had come from Dr. Griffiths: it was bismuth mixture, to soothe the upset stomach. The patient, however, did not improve. Later in the evening Greenwood again went over to the doctor, and received a box containing two opium or morphia pills. The nurse gave these to Mrs. Greenwood about one in the morning. Within a few minutes of swallowing them she became drowsy and comatose, and the doctor was summoned, but she continued to sink, and died at about four in the morning in the presence of the doctor, the nurse, her husband, and her daughter Irene, who had been fetched from her bedroom. Dr. Griffiths signed a death certificate in which the cause of death was given as heart disease, and Harold Greenwood had his wife's body buried in a brick-lined grave in the churchyard at Kidwelly.

There it might have remained in peace had he not taken too early steps towards a second marriage. His wife died on June 16. On July 4 he ordered from London a diamond cluster ring costing £55, and on July 27 he presented it to Gladys Jones, a lady considerably younger than himself who was employed in the office of the *Mercury* in Llanelly. On September 24 he gave notice at the registrar's office in Llanelly that he intended to marry Miss Jones on October 1. At the same time, however, Greenwood was involved

to some degree with another lady, Mary Griffiths, the sister of the doctor who had attended his wife. On September 26 he wrote her a strange letter in which he said, "You are the one I love the most in this world, and I will be the last one to make you unhappy." When he was asked about this letter at his trial, Greenwood explained that Miss Griffiths had been pointed out by local gossip as his future wife, that she had been made miserable by these rumors, and that she had asked him to make her a bogus proposal in writing that she could show to people who tried to tease her about her supposed failure to secure his affections. On October 1 Greenwood did carry out his announced intention to marry Gladys Jones. His daughter Irene went away to stay with an aunt, and was later to agree in the witness-box that her father's second marriage, of which she learned only about two days before it took place, had been a shock to her. It was likewise a shock to the people of Kidwelly. As a result of anonymous letters in which Greenwood was accused of having poisoned his wife, the police began to make enquiries before the end of October, and the exhumation of Mabel Greenwood's body, authorised by the Home Office, was performed on April 26, 1920. Analysis having disclosed significant quantities of arsenic, Harold Greenwood was arrested and charged with murder.

The trial began at the Guildhall at Carmarthen on November 2, 1920. Sir Edward Marlay Samson, K. C., who led for the Crown, was a distinguished lawyer whose manner in court, remarkable for restraint, contrasted with the flamboyant demeanor of his celebrated opponent. Marshall Hall was reaching the end of his long career, and suffering from an illness which caused him great pain and which obliged him to leave the court before the final speech of the leading counsel for the prosecution. His physical condition was no doubt responsible for outbursts of temper during the conduct of the long and exhausting case.

The prisoner, who was brought to Court in an open carriage drawn by a pair of horses, looked healthy and composed, and wore a white flower in his buttonhole. Nor did he show any excitement

during the opening speech for the prosecution, which lasted about two hours. Sir Edward Samson went over the story of Mrs. Greenwood's last days, and suggested that her husband had poisoned her by putting arsenic in the bottle of wine from which she had drunk at lunch. He said that the parlormaid Maggie Williams would swear that the prisoner spent fifteen minutes in the pantry before lunch, that the wine bottle she put on the lunch table had had some wine already removed from it, that Mrs. Greenwood, and only she, drank from it, and that though the same bottle was put on the table for supper it had disappeared by supper-time. The source of the arsenic was supposed to be a large quantity of weed-killer which had been supplied to Rumsey House in April 1919. After making his opening speech, counsel began the examination of the witnesses.

There are three parts of this extraordinary case that are of especial value for the purposes of this book. One is Sir Edward Marshall Hall's cross-examination of the parlormaid, a demonstration of how the truth can be made apparent from the testimony of a witness who is perhaps prejudiced and who perhaps has an exaggerated idea of what can be remembered. Another is his cross-examination of the medical witnesses—Dr. Griffiths, who attended the dead woman, and the two Home Office experts, namely Dr. William Willcox the toxicologist and Dr. Webster the analyst. It would be difficult to find a better example of the delicate task of persuading twelve men of no scientific education to reject the opinions of eminent scientists who come to them with the prestige of high position and long experience. A third is his final speech for the defence, usually regarded as one of this great orator's most successful achievements, and containing, in the peroration, a fine specimen of the emotive style. The rest of the case can be dealt with briefly.

From Miss Phillips, a friend of the dead woman and one of the early witnesses, Marshall Hall obtained the statement (which was to be useful to him in dealing with the parlormaid) that Mrs. Greenwood "could not drink the wine because she thought the

maids were tampering with it." The witness insisted, however, that no wine was on the table for supper on Sunday. If there had been any, she said, she would certainly have drunk some. From the nurse, who was the next witness, he had a description of the effect of the morphia pills which the doctor had sent over during the night. The witness said the patient was violently sick soon after taking them, fell into a state of coma, and never recovered. If she had known the pills contained in all a grain of morphia, agreed the nurse, she would not have administered them. Marshall Hall did not fail to drive this home to the jury:

You have told us that if you had known that they contained a whole grain of morphia you would not have given them to her. You know from your experience that a whole grain of morphia is a serious thing. Tell me if you had known that they contained a whole grain of morphia why you would not have given them to her?

I would have thought they were dangerous.

It is to be noted that Marshall Hall not only secured from the witness the useful word *dangerous* in connection with the morphia pills, but likewise repeated three times in a single question *a whole grain of morphia*. The use of the phrase *a whole grain* naturally implied that this is a very large quantity. The next witness was Dr. Griffiths.

His examination by the prosecution had scarcely begun when it produced a sensation. The pills that he had sent Mrs. Greenwood, he explained, were not morphia pills at all, but opium pills, and each pill contained not half a grain of morphia, as alleged, but about one tenth that quantity. At this point Marshall Hall leaped to his feet and protested that the witness on three previous occasions had sworn that the pills contained half a grain of morphia each. When asked by the judge how the confusion had arisen, the doctor replied, "It was a mistake, my lord." The court then adjourned for the day.

It was at this time Marshall Hall's intention to persuade the jury that Mabel Greenwood had died as a result of the administration of a grain of morphia, a quantity which might well be fatal to a person suffering from heart disease. Later in the case he advanced the suggestion that the arsenic found in the body had been accidentally given her by Dr. Griffiths instead of bismuth mixture. This, however, was not in his mind during the following passage of cross-examination, in which the doctor's confusion between opium and morphia is relentlessly reiterated and exposed to the jury's view from different directions. It can be seen how on matters in which there can be very considerable doubt—e.g., the effects of drugs on a particular human body at a particular time—the witness was successfully invited to choose between such extreme expressions as “perfectly safe” or “no danger” on the one hand and “the smallest doubt whatever . . . that she would have been dead” or “that would have killed her for certain” on the other.

If you had given her two half-grains of morphia, you would not be surprised that she died at 4 o'clock?

Yes, I would.

* * *

Now, Dr. Griffiths, there is an enormous difference between morphia and opium?

I know that.

No man who has had anything to do with drugs would use them as identical terms?

They are used; they are called morphia.

The quantity of morphia in opium depends, does it not, on the quality of the opium and where it comes from?

That is so.

The Judge: Morphia is ten times as strong as opium, is that it?

Yes.

Sir E. Marshall Hall: A tenth to a third of a grain is a dose of pure morphia?

A dose is one-eighth to one-half.

Anyway, one-eighth to one-half of a grain is a dose?

Yes.

You said that in your opinion there would have been no danger in giving this woman two half-grains of morphia?

I meant two half-grains of pure opium.

I asked you the question last night purposely before the Court rose. I asked you if it would have been safe to give this woman two half-grains of morphia, and you said it was perfectly safe. Did you think I meant opium then?

Yes.

The Judge: It is entirely for the jury to say whether he is accurate or not in saying that he thought you meant opium.

Sir E. Marshall Hall: I give every allowance to every witness who says what I don't expect him to say. (To the witness) Have you the smallest doubt whatever that if you, as a medical man, were accurate when you said you gave her two half-grains of morphia after ten o'clock that she would have been dead before four o'clock?

If I had given her morphia she would, but I did not give her morphia.

If you had been accurate in the evidence you gave to the coroner and to the magistrates that you had given her two half-grains of morphia, that would have killed her for certain?

That is so.

Now let me see what you did say. In cross-examination you said, "In each pill there was half a grain of morphia. I have heard that the defendant states that both pills were given at the same time, according to the directions on the box. In her condition at 10:30 it would be perfectly safe to give her a grain of morphia." Now do you mean to say that you understood that they were talking about opium?

The witness did not reply.

Do you think Mr. T. R. Ludford, the solicitor for the defence, was talking about opium?

It was opium I gave.

That is not an answer. Do you represent to the jury that you, a medical man of twenty-five years' standing, when you were cross-examined by the representative of the prisoner, who asked you whether you did not give two half-grains of morphia, and you said yes—do you think that he was cross-examining you about opium?

The witness did not reply.

Do you suggest that Mr. Ludford was under any misapprehension when he was cross-examining you?

I do not.

Do you mean to suggest that the pills had caused her death?

No.

What! You did not appreciate that?

No.

I am sorry to press you, but I am defending a man on trial for his life. Did you not know that what Mr. Ludford was trying to do was to say that what had killed her was the fact that two half-grains of morphia had been given to her?

I did.

Then why not be fair?

I am trying to be.

You know you said you did not know about this till yesterday morning. You know that Greenwood had told the police it was the pills that did it, and that after she took the pills she went to sleep and never woke again?

Yes.

Did you know this, that as a fact within a few minutes of taking those pills she did go to sleep and that she never woke?

The witness did not answer.

The examination of Maggie Williams, the parlormaid, came on the same day. The cook went to the witness-box before her, and swore that her dead mistress had often drunk burgundy for lunch, but that she, the cook, had never seen port in the house. The parlormaid, continued the cook, had been given notice for coming in late at night. The cook also swore that Harold Greenwood often washed his hands in the pantry after he had been working in the garden. This was an important point, because the prosecution put it forward as a suspicious circumstance that Greenwood, according to the evidence of the parlormaid, spent fifteen minutes in the pantry before lunch on Sunday. It was during those fifteen minutes that he was supposed to have introduced arsenic into the bottle of wine. In proving that Harold Greenwood frequently visited the pantry to wash his hands before meals, Marshall Hall did much to discredit the theory of the prosecution. He likewise obtained from the cook the important statement that Miss Irene, as well as Mrs. Greenwood, was in the habit of drinking burgundy, though, since the cook was not present in the dining-room during meals, her testimony on this subject was less important than that of the parlormaid, who was now called.

She had previously made several statements to the police, and Marshall Hall used them with great skill to destroy the effect of her evidence. Sixteen months had elapsed between the trial and the events which she was asked to recall. When interrogated by the police within a few months of those events, she had varied her story considerably, and at the trial, in the hands of the most skillful cross-examiner at the bar, she was unable to maintain the details of her story. In his closing speech Marshall Hall referred to her as a "poor little frightened thing," and this seems to have been the impression that she made on those in court.

For the purposes of the present study, a reader can distinguish three elements in the success of this cross-examination. First, counsel destroyed the credibility of the witness by persuading her to undertake impossible feats of recollection. She was obviously unaware of how little can be recalled with certainty after so great a lapse of time. Counsel would first encourage her to make statements on points of minute detail, using such phrases as "Tell me to the best of your recollection," or "Do you mean to say that you cannot state . . . ?" The witness, for example, was invited to tell the court what was written on the label of the burgundy bottle supposed to have been on the table that she had laid sixteen months previously:

Do you mean to say that you cannot state what sort of label was on the bottle from which Mrs. Greenwood drank burgundy?

It was a white label.

Was there anything written on the white label?

There was something printed on it.

Tell me to the best of your recollection what it was?

There were three red letters on the white label.

When the details had been extracted, counsel would express vehement surprise that they were consistent neither among them-

selves nor with the sworn statements that the witness had previously made to the police. "How did you come to say . . . ?," "Why did you so positively say . . . ?," and similar phrases were used in this part of the cross-examination. At one point Sir Edward became so vehement that he had to be restrained by the judge.

Counsel also endeavored to discredit the witness with the jury by the suggestion that she was prejudiced against the prisoner's family, partly because she had a personal dislike for Irene Greenwood, and partly because she had been dismissed. Third, Marshall Hall attempted to impeach her character. He was probably following a hint given by Mrs. Greenwood's remark to Miss Phillips about the tampering with the wine which was supposed to take place in the kitchen, and did not perhaps anticipate the assistance that the witness would give him in this line of enquiry.

The cross-examination, which occupied part of two days, is too long to be given in full. In the course of it the witness was led into clear contradictions on the following questions:

Did Greenwood visit the pantry once before lunch, or twice?

Did he drink whisky out of a bottle or a decanter?

Did Mrs. Greenwood drink port or burgundy?

Was the label red or white, what color was the print on it, and what did the print say?

Did Mrs. Greenwood drink one glass or two?

Did she help herself to wine or was it poured out by the maid?

Was the bottle three-quarters full after lunch or half full?

Some significant parts of the cross-examination may now be given.

Did you tell the police that it was a bottle of port wine you put on the table for dinner on June 15, and that it had on it a red label and black print, and that you read on it the word "port"?

Yes.

I suggest to you that it was labelled "Beaune"?

No; it was port wine.

Do you suggest that Mrs. Greenwood was in the habit of drinking port wine?

Oh, no, sir.

What did she drink?

Burgundy, but port wine was there on this Sunday.

I know you have said so. Do you know that Beaune is burgundy?

No, sir.

What was the burgundy she was drinking?

White label.

What was written on the white label of the bottle of burgundy that Mrs. Greenwood used to drink?

I cannot remember.

Had you seen Mrs. Greenwood drinking burgundy often?

Not to my knowledge.

Did she not drink it always at dinner?

Not always.

Nearly always?

Yes.

Do you mean to say that you cannot state what sort of label was on the bottle from which Mrs. Greenwood drank burgundy?

It was a white label.

Was there anything written on the white label?

There was something printed on it.

Tell me to the best of your recollection what it was?

There were three red letters on the white label.

And are you quite certain that the bottle you put on the table on this Sunday was a black bottle with a red label with black letters and the word "port"?

It had "port wine" written on it.

Do you swear that?

Yes, I do.

How many wine glasses did you put on the table?

I put two.

You put one for Miss Irene?

I put one wine glass for Mrs. Greenwood and one for Mr. Greenwood.

Do you mean to say that you did not know that Miss Irene was in the habit of taking burgundy?

Not to my knowledge.

Hadn't you ever seen her taking burgundy?

Never.

Will you swear that you never saw her taking burgundy?

Yes, I will.

Do you like Miss Irene?

I have never said anything against her.

But do you like Miss Irene?

The Judge: That is a fair answer. She has said that she has not said anything against her.

Sir E. Marshall Hall (to the witness): The other witnesses say that she took burgundy sometimes.

I never saw her.

Mrs. Greenwood had given you notice?

No, sir.

Did you tell Benjamin Williams about the end of May, 1919, that Mrs. Greenwood had given you notice, and you asked him to intercede for you, as your mother had a large family and you did not want to lose your place?

No, sir, I didn't say it.

Will you swear it?

I will swear it.

Did Mrs. Greenwood complain to you of your having the wine?

No.

There was no complaint by Mrs. Greenwood or anyone else of your having taken the wine and put water in the bottle instead?

No.

Are you a teetotaller?

Yes, I am. I am having a name for having drunk it, but I am not drunk today.

The Judge: Are you a teetotaller?

Yes, I am always a teetotaller.

The Judge: Since when?

I have never been drunk.

Sir E. Marshall Hall: What do you mean in saying: "I am having the name for having drunk it, but I am not drunk today"?

The Judge: She thought it was an imputation of drunkenness. (Laughter).

The witness explained that at the Police Court at Llanelly, Margaret Morris, the cook, and another said they had seen her in a condition of having taken too much to drink.

Sir E. Marshall Hall: Mr. Greenwood is here on his life. Do you swear it was an unusual thing for him to go to the china pantry?

Yes.

How many times do you say Greenwood came into the house that morning?

I cannot remember any more.

But how many times would it be?

Only that once.

Counsel read over the evidence given by the witness on the previous day, "Mrs. Greenwood helped herself to the wine." The witness: That is a mistake. I poured it myself.

Counsel (quoting from the statement): "I remember Sunday, June 15, quite well. I laid the table for dinner, and I put thereon a decanter containing whisky and a bottle containing wine." (To the witness) How did you come to say to Mr. Haigh that it was a decanter containing whisky?

The witness: Because I did not understand what he was speaking about.

You draw a distinction between a decanter of whisky and a bottle of wine. Yesterday I pressed you, and you swore that it was a bottle of whisky. As a matter of fact, was there a wine-glass on the table at all? Were not the wine-glasses little tumblers?

Yes.

Were they red?

They were more pink than red.

Yesterday I questioned you very hard whether Mrs. Greenwood had more than one glass, and you said you were positive she had only one glass.

Yes.

Then what did you mean by saying to the detective that you could not remember whether she had more than one glass?

I cannot remember everything.

Why did you not tell me yesterday?

I cannot remember everything.

And why did you so positively say she had only one?

No answer was returned.

You said yesterday that the bottle was three-quarters full and only one glass was drunk out of it. You stated to the detective, "At that time the wine bottle appeared to be about half full." So a quarter of the bottle had been drunk. Did you tell the detective that the bottle then was about half full?

No answer was returned.

Did you consider the importance of it? I asked you yesterday whether Miss Irene took a glass of the wine, and you said she did not, and that only one glass was taken, which you poured out to Mrs. Greenwood. The bottle was three-quarters full.

I said three-parts full.

Yes, three-parts full, and you said to the detective that it was half full?

Yes.

Sir E. Marshall Hall (quoting from the statement to the detective): "Mr. Greenwood came from the garden on two separate occasions, and on each of those occasions entered the china pantry and remained there about a quarter of an hour, and went straight from there on the last occasion to the dining-room, where he remained only a minute or two, and went back to the garden."

The witness: I do not remember saying that.

How often do you say that you saw Greenwood going into the china pantry?

Only once.

Very different in character was Marshall Hall's cross-examination of the Home Office experts. The evidence of John Webster, the analytical chemist, who testified that he had found a quarter of a grain of arsenic in the body, could not be controverted. In reply to questions Mr. Webster agreed that the minimum fatal dose was about two grains, that is to say, about eight times what had been found in the present case. Marshall Hall's main effort was to make the jury conscious of what a small quantity a quarter of a grain is—he had this quantity of arsenic exhibited in a red paper—and of what a small proportion it bears to the total weight of the organs examined. The total weight of the organs, he explained, amounted to 176,040 grains. His object was to suggest to the jury that experiments depending on these minute quantities

might well be erroneous. In this cross-examination there are also two interesting examples of the feelings that can be aroused about foreign countries, in this case America. These feelings are of two kinds, working in different directions; Marshall Hall used both within a few minutes.

You took one twenty-third part of the liver for the purposes of testing. Is it not recognized specially by the American analysts that in order to make a reliable test you should take half the liver?

Here the suggestion is that because this recommendation is made by American analysts it is likely to be valid. Marshall Hall was trying to bring in on his side the prestige of American science, about which the jury probably knew no more than he did. A few minutes later he was working the far commoner prejudice in favor of the home country:

Counsel referred to a case in the Manchester district where a number of people were poisoned as the result of drinking beer, which, it was found, contained arsenic, and asked if during the sugar shortage in 1915 the glucose in this country had been very largely imported from America.

The witness: Yes.

It was obviously impossible to control this glucose during the war with the same care that it would have been controlled if it had been made by an English manufacturer?

I do not know to what extent it was controlled.

Dr. William Willcox, the toxicologist who appeared for the Crown, was an old acquaintance of Sir Edward Marshall Hall, who had cross-examined him many years before in the Seddon case. As a result of that trial Seddon had gone to the gallows for poisoning his lodger with arsenic. Marshall Hall knew that it was very unlikely that he could prove Dr. Willcox to be wrong on the main facts of his testimony. In eliciting facts from the doctor he there-

fore contented himself for the most part with making it clear to the jury that the minimum fatal dose is about two grains, whereas only one quarter of a grain had been found, and also that the symptoms of arsenical poisoning are similar to those of indigestion. His theory was that Mrs. Greenwood had suffered from indigestion as the result of eating gooseberry tart. The rest of his cross-examination consisted of questions which had no crucial bearing on the case but which were framed in such terms that the witness was bound to agree with them. Marshall Hall gave the witness few opportunities to disagree with him or to answer "No." The jury, accordingly, to whom the purport of some of the discussions may have been less than completely clear, received, during this long cross-examination, the impression that the chief scientific witness for the Crown was being won over to the views of the defence. Some of Marshall Hall's ingenious questions follow. It will be noticed that his usual method was to propose a hypothetical situation in which something unusual might occur, to obtain Dr. Willcox's assent to this possibility, and then to leave the jury to suppose that the hypothetical situation covered the case before them.

Diarrhoea is more of a symptom of gastric poisoning than arsenical poisoning?

It might have been in the case of disturbances caused by eating food such as gooseberries.

Would you expect diarrhoea to precede the vomit?

Possibly it might.

Answering further questions, the witness said that Mrs. Greenwood might have been susceptible to many kinds of food.

Can you tell me which of the symptoms you say is entirely inconsistent with gastric trouble?

Yes, the long continuous vomiting and diarrhoea for several hours would be more consistent with arsenical poisoning.

Can you give me any one of the symptoms which is entirely inconsistent with gastric trouble?

I cannot give you the symptom, because there is no distinction. Gooseberry skins would give the intestinal irritation, but it would not produce a condition similar to symptoms of arsenical poisoning.

The utmost deduction that you can draw against the accused here is that something on the borderline of the possible fatal dose had been administered?

Approximately the minimum fatal dose had been administered.

Sir E. Marshall Hall then quoted a case of arsenical poisoning from a standard American book on poisons, and also quoted Taylor's English standard work on the same subject, in which it was stated that "there must be unequivocal proof that some rational quantity—that is to say, at least a grain or a large portion of a grain—of the metal was found in the viscera." He asked the witness whether he agreed with that. Dr. Willcox replied that he agreed with it in the main, "but," he added, "in this case the great vomiting and diarrhoea would account for the elimination of considerable quantities of the arsenic."

It was during the cross-examination of Dr. Willcox that Sir Edward Marshall Hall brought off one of his most famous coups. Dr. Griffiths had stated in cross-examination that he kept Fowler's solution (an arsenical preparation) in his dispensary. Marshall Hall asked Dr. Willcox what Fowler's solution looked like. "It is a reddish liquid," said Willcox.

"Rather like this?" asked Marshall Hall, showing him a small bottle.

"Yes," said the doctor.

Now Marshall Hall's bottle, as he triumphantly explained to the jury, contained bismuth mixture. He had bottles of both preparations with him in court, and was able to demonstrate in this convincing way that they were of similar appearance.

Counsel: Dr. Griffiths said that both these bottles were kept in his surgery, and he states that he gave this lady a dose of four teaspoonfuls of this mixture of bismuth?

Yes.

If by some unfortunate mistake he, in the anxiety and hurry, gave her four teaspoonfuls of Fowler's solution, you would have got all the arsenic you found, or more than you found?

Yes.

And there would be practically no distinction in colour in the mixture, whether the mixture were of bismuth or a solution of arsenic?

No, they resemble one another.

Dr. Griffiths was recalled to the box, and unhesitatingly repudiated the suggestion that he had given Mrs. Greenwood arsenic instead of bismuth, but Marshall Hall's bold hypothesis may have had some effect on the minds of the jury.

Though highly dramatic, the remainder of the case, up to the time of Marshall Hall's closing address to the jury, may be briefly summarised. His opening speech for the defence contained two points of interest to us. Dr. Willcox was referred to as "a gentleman from London, for whom we have every possible respect," whereas the Welsh jury were reminded that one of the two doctors called by the defence was "of Swansea"—a local boy, in fact. In this speech Marshall Hall made the first of two quotations from *Othello*. In alleging that local prejudice had been strong against Greenwood, counsel said that to jealous people trifles light as air were confirmation strong as Holy Writ. The point was well taken. In uttering these words the villainous Iago is explaining to the audience the fraudulent suggestions by which he hopes to convict the innocent Desdemona of a crime she has never contemplated. A comparison of the elderly Welsh solicitor with Desdemona is perhaps a little incongruous, but the true objects of comparison in the

minds of the jury were not people, but situations, and the quotation was a masterly choice, not least because it led up to the famous lines from the same play that Marshall Hall cited in his closing speech.

Greenwood went into the box in his own defence, but his examination by Marshall Hall took only a few minutes. "Did you," he was asked, "directly or indirectly administer or cause to be administered to your wife any arsenic at any time in your life?"

The answer was quiet but emphatic. "I have not."

This evidence was unshaken during his cross-examination by counsel for the prosecution. Shortly after he left the witness-box, his place there was taken by his daughter Irene. She had been present at the meal at which her mother was supposed to have been poisoned, and her statement that she had drunk from the same bottle of wine produced a sensation. Her evidence was perfectly clear and probably decisive. The judge in the summing-up said, "If the daughter partook of the wine, then there is an end to the case," and Marshall Hall always held the opinion that Irene Greenwood saved her father's life.

His closing speech for the defence, which lasted for three and a quarter hours, is a model of its kind and abounds in illustrations of the principles examined in this book. Some of the facts against him were too clearly proven to be denied, and his method here was to exaggerate rather than to minimise them, thus giving the impression that, since he made no effort to gloss them over, he considered them of no significance in the case. Greenwood's possession of arsenic in the form of weed-killer had been clearly established, and his counsel admitted it in these terms: "Sir E. Marshall Hall declared that Greenwood had in his possession between 1916 and 1919 enough arsenic to poison the whole town of Carmarthen . . . Huge tins were sent down filled with specific directions." (Perhaps Sir Edward meant "Huge filled tins were sent down with specific directions"? The tins were filled with arsenic, not with specific directions.) The capacity of these *huge* tins was ten pounds each. Facts stated in cross-examination by prosecu-

tion witnesses, whether innocent or not, were described as *admissions*: "Dr. Griffiths has admitted that he had this bismuth mixture in his stock bottle in his surgery."

In discussing the medical evidence, Marshall Hall emphasized the minuteness of the quantities involved. "It was stated that in the liver there was one-half that amount of arsenic that was found in the whole system, and in the liver the amount discovered was one 1,700th. part of a grain. He did not know whether the jury-men's powers of imagination were sufficient to enable them to appreciate what that meant. . . . He did not want to quarrel with the honesty of the evidence given by the experts, but he did challenge the accuracy of their calculations, and he asked the jury to say that it was not right that a man should be sent to the gallows from deductions made from observations so minute as he had endeavoured to explain to them." Later in his address counsel spoke of "the ten-thousandth or the millionth part of a grain." These quantities differ by a factor of a hundred, and the phrase is an extreme example of the confusion between absolute and relative magnitudes. A citizen of New York is no less significant because he makes only a minute fraction of the population of the city, and chemists can make significant deductions from quantities of arsenic minute in themselves, provided these minute quantities are known fractions of a larger total. Marshall Hall was on firmer ground when he asserted that the quantity of arsenic stated to be in the body was too small to cause death. "This was the first case on record," he said, "where such a small quantity of arsenic has been put forward as consistent with a fatal dose."

Marshall Hall's discussion of the medical symptoms showed great verbal ingenuity. Arsenic, like any other poison taken by the mouth, produces "gastric symptoms." *Gastric* means merely *to do with the stomach*. Anyone suffering from arsenical poisoning may be sure of "gastric trouble." When, therefore, Marshall Hall asked Dr. Willcox, "Can you tell me which of the symptoms you say is entirely inconsistent with gastric trouble?," he could reasonably expect the answer "None." He did not receive this answer, for

Dr. Willcox replied: "Yes, the long continuous vomiting and diarrhoea for several hours would be more consistent with arsenical poisoning." The question is not genuinely answered by this, and Marshall Hall repeated it, receiving for the second occasion the reply: "I cannot give you the symptom, because there is no distinction. Gooseberry skins would give the intestinal irritation, but it would not produce a condition similar to symptoms of arsenical poisoning." Marshall Hall, consciously or not, was here exploiting a double meaning of *gastric trouble*, namely (1) any digestive disturbance; and (2) a digestive disturbance due to natural causes. In his final speech, this part of the evidence appeared as follows:

Dr. Willcox had admitted that he could not find a single symptom which was consistent with arsenical poisoning only. If the symptoms were not entirely consistent with the deduction that death was due to one cause only, then the presumption was entirely swept away.

Marshall Hall had (in this speech) two attitudes towards his opponents, that is, towards the counsel and witnesses for the prosecution. Those whom he could not hope to discredit in the eyes of the jury he spoke of with respect:

The accused man had called evidence, and therefore the last word was given to counsel for the Crown. He had absolute confidence that Sir Marlay Samson would not take undue advantage of that fact.

Sir Marlay Samson's cross-examination of Irene Greenwood was described by Marshall Hall in these terms: "the very stringent, very effective, very direct, but very courteous cross-examination of my learned friend . . . He felt it his duty to test the girl's evidence, and he tested it by the most searching cross-examination . . ." Dr. Willcox was described as "an honourable man and a great expert."

The other witnesses for the prosecution, however, came in for little flattery. Of Dr. Griffiths (of Kidwelly) Marshall Hall told the jury that "they knew what manner of man he was." Miss Phillips was described as "the local gossip," and of Miss Griffiths, the doctor's sister, Marshall Hall said that she might have hoped to be the second Mrs. Greenwood. Of Nurse Jones: "Did the jury believe they had had the whole truth from Nurse Jones? He suggested there were many things that could have been told if she had been so minded. The whole keynote of Nurse Jones was that she was dependent on medical men for a living. It was not part of her duty to criticise doctors' prescriptions." Poor Maggie Williams came off perhaps worst of all. She was called "a poor little frightened thing," and in this passage the words *comes to the rescue* suggest that she concocted evidence:

In order to give Greenwood an opportunity to poison this wine there must be some evidence to associate him with the wine. Hannah Williams comes to the rescue, and said that she saw him going into the china pantry.

Her evidence that the wine bottle was labelled "Port Wine" was called "a little touch of the domestic servant," and Marshall Hall said outright: "The woman was lying, and wildly lying."

The methods by which he strove to excite favorable feelings towards the prisoner and himself are worthy of study. He asked for sympathy on his own behalf on the grounds of illness. Then he held up for admiration the *esprit de corps* that united the prisoner and himself as members of the same profession (Greenwood was a solicitor). Feelings of group-loyalty, whether uniting members of a family, school, regiment, or country, are always thought to be creditable. There was a strong histrionic element in Marshall Hall's appearances in court, and he sought to arouse the sympathy of the jury for his professional performance just as a successful singer or acrobat arouses the sympathy of the spectators for his.

After concluding his review of the evidence, Sir E. Marshall Hall said he had done his best, as any honest professional man would.

He would not have been there under ordinary circumstances, but the prisoner was a member of his profession. He (counsel) had achieved some small measure of reputation as to knowledge of this class of case, and Greenwood, as a member of his profession, demanded his services.

Harold Greenwood was not a suitable object for pathos, but he had a family, and Marshall Hall did what he could with them, concentrating mainly on the prisoner's eldest daughter Irene, who, though twenty-two years of age, was in one passage of the speech referred to as "his child," while Kenneth, aged fourteen, became "the little boy."

If there is any pathos, any sort of sympathy or feeling that could be raised, it must have been raised by the sight you saw on Saturday afternoon—a young woman standing in the witness-box in a trial of her father for his life. Don't forget that, if she loved her mother, as it is admitted she did, she would be hardly likely to have a kindly feeling for her father, whose hand had done to death the mother whom she loved.

As to the jury, they were described as "men of the world," and Marshall Hall did not forget the natural reluctance of most human beings to do anything that may destroy human life. The cliché *launch him into eternity* is characteristic of this kind of appeal:

If you are satisfied he did it, and you are certain you can put your hand on your heart and say, if that man was standing on the execution platform, you would draw the lever to launch him into eternity, then you will find him "Guilty," but if you are not satisfied, and feel that the doubt is so strong that it is impossible for you to put your finger upon any piece of evidence that overrides it, you are bound to say he is not guilty.

For the further assistance of the jury, Marshall Hall suggested that Providence was on the side of the defence: "It was only by some providence that I looked at the blue paper that was handed into Court."

In his peroration Marshall Hall spoke his celebrated piece about the scales of justice, cynically referred to by his brothers at the bar as "Marshall Hall's scales of justice act." This memorable trope is somewhat scantily reproduced in the report of the trial, which merely says, "Sir E. Marshall Hall then alluded to the figure of justice holding the scales. 'You must be satisfied,' said counsel, 'that one of those scales, the scale for the prosecution, has fallen before you can be satisfied that this man is guilty.'" The effect of the passage, of which we have only this brief account, was considerable, and the prisoner himself bowed his head to his knees, becoming invisible in the dock for some moments. Marshall then dropped his voice to a dramatic whisper, and repeated to the jury the lines spoken by Othello as he bends over the sleeping Desdemona before suffocating her:

but once put out thy light,
Thou cunning'st pattern of excelling nature,
I know not where is that Promethean heat
That can thy light re-lume.

This reminder that if Greenwood were wrongfully convicted the error could never be put right was not lost on the jury. *Othello*, with its theme of suffering innocence, is perhaps the most painful of all Shakespeare's plays, and the mood created by this quotation was far more important for Marshall Hall's purposes than the reflections produced in the minds of the jury by the meaning of the words. "Are you by your verdict," he asked, "going to put out that light? Gentlemen of the jury, I demand at your hands the life and liberty of Harold Greenwood."

Sir Marlay Samson, who followed for the prosecution, made some change in the Crown theory by suggesting that the arsenic might as well have been given in medicine, tea, or brandy as in wine. By an unfortunate slip, he commented unfavorably on the absence from the witness-box of the second Mrs. Greenwood, the former Gladys Jones. This comment is forbidden by English law,

and had Greenwood been convicted, it would undoubtedly have been the basis for an appeal for a new trial.

The judge's summing-up, which occupied the last day of the trial, was thought to be rather in favor of the prisoner. The jury, after an absence of two and a half hours, returned a verdict of not guilty, and amid boisterous demonstrations of popular approval the prisoner was discharged from custody.

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